Nos. 38 and 39.

# In the Supreme Court of the United States

October Term, 1946.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION and INTERNATIONAL LADIES' GARMENT WORKERS' UNION,

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, *Petitioner*,

vs.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION and NATIONAL LABOR RELATIONS BOARD.

*On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.*

## BRIEF FOR DONNELLY GARMENT WORKERS' UNION.

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## BRIEF FOR DONNELLY GARMENT WORKERS' UNION.

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### Opinions Below.

The opinion of the Circuit Court of Appeals, now before this Court because of the grant of petition for cer-

tiorari filed by the Labor Board and the International, is represented in 151 Fed. (2d) 854. A prior opinion of the Circuit Court of Appeals is reported in 123 Fed. (2d) 215. For the convenience of the Court, a supplemental list of cases involving the same parties in the same dispute is added to the general table of cases, tax books, statutes, *supra*.

## Jurisdiction.

This Court has jurisdiction by virtue of the provisions of Section 240 (a) of the Judicial Code as amended February 13, 1925, and upon Section 10 (e) and (f) of the National Labor Relations Act.

## STATEMENT OF FACTS

The Donnelly Garment Workers' Union, appellee herein (intervener below), is an unincorporated organization of all employees, other than those having supervisory powers or an official position (I 135, 191) of the Donnelly Garment Company and the Donnelly Garment Sales Company, located in Kansas City, Missouri. It was organized on April 27, 1937, and on May 27, 1937, executed a contract with the employers for a term of two years, which has since been renewed and is in effective operation at this date. In addition, a Supplemental Wage Agreement, entered into between this union and the employers, is also in effect.

The Donnelly Garment Company is a corporation engaged exclusively in the manufacture of ladies' garments, which are marketed through the Donnelly Garment Sales Company, a corporation, the operation of both companies being in and directly related to interstate commerce.

The International Ladies' Garment Workers' Union was the original complainant in this proceeding before the National Labor Relations Board.

For purposes of brevity, we shall refer to the Donnelly Garment Workers' Union as the "DGWU," the Donnelly Garment Company and Donnelly Garment Sales Company collectively as "The Company," the International Ladies' Garment Workers' Union as "The International," and the National Labor Relations Board as "The Board."

This action was started on April 6, 1939, two years after DGWU was organized, through the filing of the original complaint against the Company by the acting regional director for the Seventeenth Region of the Board. On April 27, 1939, the original complaint was withdrawn

and an amended charge was filed alleging that the Company had engaged in and was engaging in unfair labor practices affecting interstate commerce. A copy of the complaint, the amended charge, and notice of hearing were served on the DGWU, as party to the contract. The DGWU, upon permission of the acting regional director, intervened in the action and thereafter filed its motion to make the complaint and charge more definite and certain, its answer, and its application for the Board to hold an election (A 409, 560; X 3844) to determine the choice of the employees as to their bargaining agent.

Other less formal requests by the DGWU for the Board to hold such an election had preceded this formal application and others have followed it, none of which has been granted. (I 242-3, IV 1336qqq, XI 3965).

Hearing on this original complaint was held before Trial Examiner Batten, who sustained the allegations of the complaint and was sustained by the Board in refusing to receive or consider as material the testimony of any employee and the proffered testimony of every employee as to their reasons and motives in forming the DGWU and their freedom from interference in doing so. The findings and opinion of the Board were reviewed by the Circuit Court of Appeals in November, 1941. The opinion and decision of that court (123 F. (2d) 215) was that the testimony of employees should have been received and weighed by the Labor Board and the case was sent back to the Board for further hearing with instructions:

> "To accord to the petitioners an opportunity to introduce all of the competent and material evidence which was rejected by the trial examiner; and to receive and consider such evidence together with all other competent and material evidence in the record before making new findings and a new order." (l. c. 225.)

The hearing under this mandate was heard by Trial Examiner Batten on various days in July, August and September of 1942. In this hearing the DGWU was permitted to put on not a single witness in its case-in-chief (IX 3255), having the opportunity only in surrebuttal to submit the testimony of six of the employees as to specific matters already before the court, but which did not include matters on which the Circuit Court of Appeals directed that evidence be taken (IX 3763, 3766, 3768, 3772, 3774, 3776). The Company was permitted to introduce in its case-in-chief the testimony of the president of the Donnelly Companies, Mrs. Reed (who was ill at the time of the prior hearing), and a few other witnesses. The ruling of the Trial Examiner, and the Board (which is the ruling considered and reviewed by the court below), was to the effect that the employees of the Donnelly Companies had not exercised their free will and choice in the selection of their union. This ruling was made without the Trial Examiner's permitting the testimony of the employees to go into the record to the effect that the DGWU was and still is the union of their free will and choice. The fact that the DGWU was the free will choice of the employees, and that they were not coerced in any way by the Company, is supported by the testimony of every employee who testified on this point for DGWU[1], for the Company[2], and for the Board (these employees were actually witnesses for DGWU although examined first by the Board), and by the testimony of seven ex-employees who testified on behalf of the Board[3], except

(1) II 704, 715 & 718a-b, 718l, 718r & 718u; (second hearing) 3765, 3769, 3773, 3775.

(2) II 405-410, 561, 612, 655, 664, 662, 672, 675; (second hearing) VIII 2566, 2632, 2722, 2772, 2858, 2914, IX 3006, 3049-3050, 3078, 3140, 3187; X 3726, 3735, 3739, 3743, 3756.

(3) I 488, II 355; (second hearing) IX 3462-3463, X 3492 & 3501, X 3581.

two: one of whom admitted perjury[4] and the other's testimony to this point was conflicting.[5]. The International's witnesses testified only as to collateral matters. The affidavit of every one of the 1160 employees that they chose the DGWU without any interference or coercion is also in the record[6]. Also on behalf of the DGWU, was an offer of testimony of every employee to the same effect[7].

The DGWU and the Company petitioned the Circuit Court of Appeals to review and to set aside that order of the Board. In the opinion of the Court, reported at 151 F. (2d) 854, it was held:

> "Our conclusion is that the Company and the plant union have not yet had the full and fair trial to which they are constitutionally entitled." (l. c. 875.)

and the Court further held:

> "The prayer of the Board for a decree of this Court enforcing the order under review is denied for want of due process in the proceedings upon which the order is based." (l. c. 875.)

From that decision the Board and the International petitioned this Court for Writs of Certiorari, and the case is now before this Court upon writs granted to petitioners on April 22, 1946.

(4) May Stevens testified that she committed perjury when she signed the affidavit that she joined of her free will (X 3690, 3703).

(5) Etta Dorsey who was shown to have had her memory refreshed by Board (IX 3369) and International (IX 3390) representatives five years after the happenings, and who testified that she *quit* her job because she was mad at a co-employee (IX 3364-5), and that she was still mad at her (IX 3365). On cross-examination she testified "Q. Was the affidavit at the time you signed and swore to it true or false so far as you are concerned? A. True." (IX 3380.)

(6) VI 1677 to 1749.

(7) I 355, II 613, II 718b, III 743 (offer of proof), VI 1675, IX 3270, X 3783.

There has been considerable litigation concerning issues related to this case. The citations to the officially reported cases are shown in the table of "Donnelly" cases *supra*; two others are in the record. (NRA and Judge Miller injunction.)

In 1935, four years prior to the filing of this action, there was a hearing on a complaint against the Company under the labor provisions of the National Recovery Act. Before the hearing on this complaint was completed the Supreme Court invalidated that Act. In the first NLRB hearing, portions of the record from the NRA hearing were offered in evidence by the NLRB attorney, and admitted by the Trial Examiner. (III 1110a-c.)

In July, 1937, the DGWU and the Company petitioned the U. S. District Court for a restraining order directed to the International, and upon the facts then presented, the Court granted a temporary restraining order. In December, 1937, a 3-Judge Court issued a permanent injunction against the International. In June, 1939 (two months after the original NLRB complaint was filed), there was a further hearing in the injunction action before Judge Miller, resulting in the issuance of a restraining order against the International. Portions of the hearing before Judge Miller are in the record in this case (IV 1336B; V 1365; V 1374c-1376).

The facts surrounding the organization of the DGWU and the attempts of the Board and the International to discredit its formation and operation are set forth below. Their variances from the statement of facts set forth by the Board is largely explained by the fact that the Board relies heavily on its own findings rather than on testimony. Actually it uses "The facts as found by the Board" as its concise statement of the facts in the case (p. 12) and completely fails in furnishing this Court with

> "A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record." Supreme Court Rule—No. 27 (d), 83 Law Ed. 1646.

Its citation to the record turns out to be a citation to the findings of the Board no fewer than 225 times, and frequently to such findings wholly unsupported (36 times). As the Court of Appeals has twice pointed out (123 F. (2d) 215, l. c. 225 and 151 Fed. 854, l. c. 875), these findings were reached by excluding from consideration the testimony of all the employees as to how and why they formed the DGWU and as to their complete freedom from coercion or interference in doing so, by repeatedly declaring it to be immaterial and thereby not putting it in the scales at all to be weighed against what the Board considers legitimate inferences from subsidiary facts. Clearly, findings reached in this manner are wholly without probative force. The Board finds subsidiary facts on testimony overwhelmingly denied, cites them as established and repeats the citations many times, basing its findings on arbitrary inferences therefrom.

An example of this is the Board's statement in its brief (pp. 12 and 13): "Through two of its management representatives, Todd and Atherton, the Company hired an attorney to advise its employees in opposing the ILGWU (X, 3872)." This statement is not the fact. The testimony on this point, without any exception, is that the employees, acting for themselves only, hired a firm of attorneys to provide them with legal assistance by way of injunction or whatever legal steps might be available to protect themselves (the employees) from violence which the International was inflicting upon employees of nearby garment factories and was then threatening against Donnelly

employees, and that then and at all times thereafter every legal expense by way of attorneys' fees and otherwise was paid by the employees only (X, 3661, Mrs. Keyes, an ex-employee, a Board witness, and at the time in question in charge of company finances; II, 558; IX, 3193; II, 557, 718v; I, 178; II, 587, 588; IX, 3083; I, 216, 238, 230; II, 430, 624, 718r; II, 572, 692; IX, 3231).

The sole and only citation in support of the Board's statement in its brief at page 12 is to its own finding (X, 3872), and even this does not so find. The allegations of the finding are that Rose Todd, "a representative of the respondent," and Hobart Atherton, "an officer of the League and a supervisor," and Sally Ormsby, after a meeting of the employees at which they were appointed a committee by such employees, employed Mr. Tyler and that the subject of employment was *solely* the possibility of an injunction protecting the employees from International violence. The statement that the Company hired an attorney is without foundation and the implication that it was for the purpose of preventing the employees from having a free opportunity to join the International is not even supported by the citation to the Board's finding.

Farther on in its brief, page 53, the Board recites that three employees employed an attorney to advise the employees in opposing the ILGWU. Besides its own finding, it cites testimony of Rose Todd that the Loyalty League is purely a social organization and that affiant was president of it; that when the employees employed attorneys on March 27, the sole thing they had in mind was an injunction or protection against violence and there had never been any talk about forming a union until about a month later (I, 38-39, 176); and the testimony of Mr. Atherton that Mrs. Reed had nothing to do with the call-

ing of the meeting and that a few employees took it upon themselves to call on a firm of attorneys to see what they could do in the way of obtaining protection and that they talked to Mr. Gossett and Mr. Tyler, who asked them if they represented all the employees and who asked for a retainer (II, 555-556), and again the testimony of Mr. Atherton to the effect that after several conferences with the attorney and after the Wagner Act had been declared constitutional, he suggested that "it might be a good thing if we could organize our own independent union" and that arrangements for the organizational meeting were made with the owner of the building on a floor not leased from the Donnelly Company and without taking the matter up with the Donnelly Company at all (II 558-559). The use of such evidence as this to support the former claim that the Company hired or paid an attorney for the employees or even the later inference that the attorney was employed to oppose the freedom of employees to join the International when the citations are either not on the subject at all or flatly contradict what they are cited to establish, is astounding.

The International's statement of this situation is that "three employees including Miss Todd employed an attorney, Mr. Frank Tyler. They paid him a retainer fee of $500.00, as they stated, to bring some sort of an injunction suit against the International." The International then states (its brief, page 17) that "no such injunction suit was ever filed but the $500.00 was kept by Mr. Tyler and applied by him on his fee for his help in organizing the plant union." As a matter of fact, the DGWU did prosecute an injunction suit, together with the Company, in the federal courts through two trials. In any case, any group of employees was entitled to employ attorneys to investigate and advise them as to the chances of an injunction giving them the needed protection, and all of the

money so used came from the employees, part of it having been borrowed from a bank and later repaid.

The Board frequently recites findings, inferences or conclusions as though they were established and even admitted facts which are supported by insignificant and discredited evidence or by no evidence whatever. We shall point out a substantial number of examples in the argument under the point of lack of substantial evidence, although we are under some handicap in doing justice to this subject since the Board's brief, due on September 24, was not served on us until September 30. No explanation of the delay has been offered up to the time this goes to print. In order to substantially comply with the rules, our own brief will have to be in the hands of the printer by the evening of October 3.

The International entered the labor market in Kansas City in the spring of 1937 for the avowed purpose of becoming the bargaining agent in that area for all employees engaged in making ladies' garments (X 3677), with special emphasis on the Donnelly Company (IV 1336g, 1336vvv; V 1549). Similar campaigns had already been waged in other cities in this area, viz: Dallas, fall of 1935 (V 1527); Memphis, spring of 1937 (V 1411-1421); St. Louis, spring of 1935 (V 1529-32). The operations of the International in its drive for members were characterized by many successive days of force and violence, and were concentrated against employees of garment companies within the radius of five or six blocks of the Donnelly Company (II 718y, VI 1336x, 1336rrr-sss, XI 4125-4171; see also Donnelly injunction cases, listed in table, *supra*). Not only did many Donnelly employees see this unlawful violence, but it was featured in several news stories in the newspapers (IV 1236-1241, 1257-1275, XI 4125-4165, 4173-75). The Company has around 1,200 employees, mostly girls and

women, and to these employees the brutality and intimidations and utter disregard for the person and rights of the employees at the Missouri Gordon, Gernes Garment Companies were not mere incidents but were driving forces to seek self-preservation in their own union. For over a month, from March 15 to April 17, 1937, these disorders continued, and the workers at these three plants were beaten, kicked, knocked down and their clothes torn with systematic bratality in the effort of the International to organize them into locals. Representatives and pickets of the International frequently stated that this procedure was a mere curtain raiser to what would be done to the Donnelly workers to induce them to join the International (II 718z).

In fact, the testimony of Mr Perlstein, Southwest District Manager of the International (V 1510-1511), was as follows:

> "By Mr. Tyler:
>
> Q. Mr. Perlstein, if I correctly understood you this morning, you do not admit that the methods used by the International at the Gordon, Gernes and Missouri Companies were illegal, is that correct? A. That is correct.
>
> Q. And I believe you stated yesterday that you never give up, didn't you? A. Yes.
>
> Q. Then we may reasonably expect that these same methods used by the International at the Gordon, Gernes and Missouri strike, whatever they were, will be continued down at the Donnelly plant unless this court grants a permanent injunction, is that true? A. Yes."

The tactics used in this preliminary organization of the smaller plants directly motivated the members of the DGWU to join together for their own protection. See the testimony of members of the union, which is in the record (IV 1336g, 1336hh, 1336mm-nn, 1336ww, 1336uuu, IX

3005d, 3013, 3047, 3171), and also that of two witnesses for the Board, Copenhaver and Weilert (X 3514, 3581), and the offer of proof in which 1,160 employees offer to so testify (III 743, IX 3270).

On March 18, 1937, a meeting of the employees was called by some of the employees (VIII 2626, 2851, 2920) to consider what might be done to protect themselves from similar violences when the International moved its attack a few blocks closer to the Donnelly plant (VIII 2569-70). This meeting was held after working hours (VIII 2569, 2923), and offer of proof (III 743, IX 3270).

They had ample reason to hold this meeting. During the course of the meeting, which was organized and attended solely by employees, Mrs. Koll suggested that Mrs. Reed, president of the Donnelly Garment Company, who was in the building, should be invited to come to the meeting (II 719, IX 3125), which was held in a room on the second floor of the same building which housed the Company, but not leased or controlled by the Company (A 575, note 4D). A messenger from the meeting went to Mrs. Reed's office and asked her to come down to the meeting place, which she did (I 45). At the meeting she made a talk to the employees in which she said she would not permit Dubinsky to force her employees to join anything they did not wish to join, but in which there was no trace of any effort to control their choice as to labor union affiliations (VIII 2627) and no effort to direct their actions as to whether they should or should not unionize.

On March 27, 1937, three employees of the Company (II 556), after informal consultation with many other employees (II 555), decided that they would consult attorneys to find out what they could do or what they were entitled to do, what they could get in the way of protection (II 556) against the violence threatening to move

over from the smaller plants eight blocks away. These employees called on Mr. Gossett of the firm of Gossett, Ellis, Dietrich and Tyler (I 63). At that conference the possibility of an injunction suit in either the state or federal courts was considered. Mr. Tyler questioned them as to whom they represented and they stated they represented the employees of the Company (II 556). It was agreed that the attorneys would investigate the legal situation and that the employees would pay a retainer. There were numerous conferences between representatives of the employees and the attorneys.

On April 12, 1937, the newspapers carried front page headlines announcing the decision of the Jones-Laughlin case by this Court, sustaining the National Labor Relations Act (I 61, XI 4177). This decision was discussed by the Donnelly employees among themselves and it directed their attention to the fact that this Act established not only the right of the employees to organize themselves and deal collectively with their employer, but also to the fact that 51 per cent or more of them had the right to deal for all employees and that such organization and such contracts were entitled to receive the special protection of the National Labor Relations Board (VIII 2577, 2857). Shortly thereafter suggestions were made that the

(8) Testimony of Hazel Saucke:

"Q. What effect did this article (on the Wagner Act) have on your mind, with reference to the question of forming a union of employees of the Donnelly Company? A. Well, it gave me confidence that we had the right to go ahead and form a union of our own liking rather than have to join the International Union." (VIII 2641.)

Testimony of Marjorie Green:

"• • • Mr. Tyler, who we had previously hired as our attorney, was there and he would explain to us what we could do in the way of protection, and Mr. Tyler did talk to us and he explained that since the Wagner Act had become constitutional that we were legally entitled to form our own employees' union; that it was just as legal and just as valid as any other labor union and he was not trying to force us to do anything against our wishes but he believed we would get the protection we needed in this way, and he thought we could handle our own collective bargaining for ourselves through our representative and it would give us the protection that we wanted." (V 1362d-1363.)

employees might greatly strengthen their position by organizing their own labor union (II 559).

Ten days later, on April 22, the Donnelly workers were startled to learn from a newspaper article that one of their co-workers, Sylvia Hull, was to be a delegate from "Donnelly Workers' Local" to the International's convention at Atlantic City (I 254, II 558, V 1513, IX 3012, 3088, XI 4171). The existence of a "Donnelly Workers' Local" was a surprise to all of the 1,300 employees except the one chosen as delegate and perhaps one other (IV 1338, V 1563), for the Donnelly garment workers knew of no meeting at which a "Local" of the International had been organized or had received their authorization to act for them, and certainly of no meeting at which they authorized anyone to represent them at that convention (I 97, IV 1336nnn). There was a demonstration of protest and resentment at Sylvia Hull's attempt to represent them and to convey to the public that the Donnelly workers were a part of the International (IX 3089).

There were repeated statements in speeches and newspapers emanating from Mr. Dubinsky, who was the president and secretary-treasurer of the International (II 378hh), and from Mr. Perlstein, to the effect that the International was going to organize the Donnelly employees; and the district manager went so far as to promise in an interview published in the Kansas City Times on February 26, 1937, that there would be a countrywide boycott of the product which the Donnelly garment workers made (V 1497-1498, IX 3132).

On April 27, 1937, an organization meeting was called by the employees themselves outside of working hours and at that meeting the Donnelly Garment Workers Union came into being (VIII 2565, 2915; IX 3005, 3077, 3121, 3171). Although the meeting was held in a room in the

same building where the employees worked, this room and the floor containing it were not owned, leased or under the control or supervision of the Company (II 382, 559; IV 1229, VI 1336h, VIII 2917, X n41, 3872).

On May 27, 1937, the executive committee, selected at this organization meeting, after substantial consideration[9] (I 213) notified the Company that it desired to present a collective bargaining contract to the employers. This contract was presented by the committee to Mrs. Reed, who had with her the heads of some of the departments and Mr. Ingraham, an attorney for the Company (VII 2096-2097, 2112). These original articles of agreements are in evidence (III 807). Negotiations lasted all day and concessions were made by both sides (II 704j, 704o).

This first contract provided for a minimum wage of $15.00 per week for all workers, including bundle boys, etc.; a 40-hour week with excess treated as overtime; promotion and seniority rights; a closed shop after June 5, 1937; arbitration of difficulties; extension of vacation privileges and the recognition of the right of the individual who may be chosen as a chairman of the union to spend the necessary time in union affairs and to continue his or her employment with the Company at the proportionate rate of pay theretofore received from the Company for the time given to union affairs. The contract was to continue for two years and consistently has been renewed, with some changes.

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(9) Testimony of Hobart Atherton:

"The executive committee of the union immediately got to work upon drafting a working agreement, or a contract, which we wanted to negotiate with the Donnelly Garment Company and the Donnelly Garment Sales Company.

After numerous conferences among ourselves, and with Mr. Tyler, we finally worked out a draft of what we wanted and asked the Company Officials for a meeting at which we wanted to present this contract to them." (II 562.)

There have been wage agreements in the form of supplemental contracts. The first, dated June 22, 1937 (III 812) was agreed upon between the parties after substantial consideration [10] (VII 3381). In this contract the basic minimum wage was raised to $16.50 and the minimum wages for specific classes of workers were raised in several instances. Minimums were guaranteed to the employees for the life of the contract and the length of vacations on pay was increased. The benefits of the contract to the employees are repeated at various points in the testimony by various witnesses (II 580; VII 2380).

The DGWU was recognized by the court as representative of the Donnelly employees and was permitted to intervene in an injunction suit filed by the Company. A three-judge U. S. District Court awarded a temporary injunction against violence, fraud, secondary boycott and interference with the contract existing between the Company and the DGWU (21 Fed. Supp. 807). Even the one dissenting judge in the final paragraph of his opinion (l. c. 831) said, "An overwhelming showing justifying an injunction under the law as it was certainly has been made." The findings of fact, conclusions of law, and the decree of the court in issuing the permanent injunction are made a part of this record (V 1616a, 1616h, 1616k).

(10) "Q. Mr. Atherton, what, if anything, was done in preparation by the committee of the union for determining what wages they would ask in the wage agreement?

"A. The Company was asked to give certain data as to wages and salaries paid different classifications of employees. And those were furnished to us. They were discussed at much length, living conditions, cost of living—by that I mean the cost of housing, food, clothing, and so on. All of those things were discussed between us as to arriving at what demands we would make in the way of minimum wages.

"Q. Did you make any investigation of what wages were being paid in other garment plants in this locality?

"A. We did, to a certain extent, inasmuch as we received information from individuals as to what they were getting, and we had been told what wages were being paid under the ILGWU contracts in other shops in Kansas City." (II 579.)

Since its organization the DGWU has functioned continuously and effectively. Meetings are held after working hours in a room which is used by the Company for style shows during the year and for the use of which room the DGWU pays rent to the Company (IV 1336l; I 227). The Executive Committee, now in its tenth or eleventh personnel, meets about twice each month; it has dealt with a great many complaints of individuals or groups and has secured satisfactory action on many of them from the employer (I 114, 231-233, 234-238a). We submit that no one can read the minute book and the history of the union and go over its treasurer's record without coming to the conclusion that here is the genuine expression of the will and choice of at least the overwhelming majority of the employees if not absolutely 100% of them. People do not continue to attend meetings with undiminished enthusiasm and carry on such organization year after year on their own initiative unless the organization has their genuine support. They are not subject to a fine for non-attendance.

As has been previously stated, the hearing before the Board was started in 1939, approximately *two years* after the first contract was signed by the DGWU with the Company. The Board called the first witness at this hearing (I 13) and this witness was not one for the Board but was the chief witness for the DGWU and the Company. The Board's attorney proceeded to examine her, not as a direct witness, but by methods usually associated with cross-examination. The examiner vigorously assisted (I 15, 18, 20, 24, 53, 63-68, 86, 87-89, 90, 92-93, 94, 96, 113, 123-124, 138, 151, 160a, 165, 185, 197). This continued for four days.

In the course of the first hearing, there was a suggestion by the attorney for the International that the evidence would show financial support of the union by the

employer and payment of the attorneys for the union by the employer. After six weeks spent almost entirely in cross-examination of the members of the union or officers of the Company (for the Board put on nothing which could be called a case of its own), no shred of such evidence developed. But these same witnesses testified to the direct opposite—that all expenses were borne by the union (for example, see: II 695; VI 1336k; IX 3231; X 3677, 3768). After employing attorneys, Miss Todd borrowed one thousand dollars from the First National Bank because the attorneys had stated to her that if the employees were actually in earnest they would be able to pay a respectable retainer fee, and she believed it was desirable to pay them promptly as evidence of good faith and used this means to do so, even before collections from the various employees were completed (II 557, 718v). A 50-cent contribution by each employee was voted about the end of March, 1937, and collected by various employees in the departments in which they were individually employed (II 587, 588; IX 3083). The Board's finding that no such meeting occurred is discussed hereinafter. The loan was repaid by the employees. The president of the bank referred to Miss Todd as a sort of handy man for the Company but stated that he never considered her as representing the Company and that neither she nor anyone else ever intimated to him that she represented the Company. He understood she represented the employees only (II 718v, 718x).

A great deal of time was spent by the attorney for the International and the attorney for the Board examining witnesses regarding the payment of rent to the Kansas City Chair Company for chairs used at union meetings. It developed that there were a few meetings at which no chairs were rented and those present remained standing

(II 694), but the testimony of the treasurer and others, with no disputing evidence whatever, was that the union itself had paid the rent for chairs at every meeting at which they had been used. Out of some 20 or 30 meetings a few receipted bills for the chair rental had been lost, but the evidence of the DGWU's officers (II 693) was positive that rental for any chairs used at a union meeting had always been paid for by the employees out of Union funds and not by the Company. With an evident feeling of triumph at having finally discovered something, the attorneys for the Board and the International produced an official of the Kansas City Chair Company, who testified that chairs for the union and chairs for the Company itself had been carried for some time in one account under the heading of "Donnelly Garment Company" (I 334w). But this official also testified that the Chair Company had no system of bookkeeping worthy of the name at the time these entries were made in 1936, and that the accounts might well have been carried as they were as a matter of convenience (I 334x). Since the chairs all went to the same building and to an organization, the first name of which was "Donnelly," it is perfectly natural for the party taking orders at the Chair Company to enter them under one heading. Absolutely no one testified that the employer paid any of this rental or that the union did not pay all of it, and there is even no inference worthy of the name that such was not the case.

There was evidence that the employees without the consent of the Company had used typewriters or ditto machines of the Company after hours for union work; it being hoped, probably, that the inference would be drawn that it was with the consent of the employer after all and that it might thereby establish such domination as wo destroy the validity of the union (I 59-62a). There was

also testimony that the chairman of the union had used a filing cabinet belonging to the Company for the depositing of certain documents connected with the union, although the filing cabinet used for membership cards had been purchased by the union itself. This filing cabinet had stood in its place for a number of years, was not then in use, and the chairman of the executive committee of the union merely put certain union documents in it because it was convenient, without asking or receiving the consent or permission of anybody (I 35-36, 217). The treasurer's accounts show disbursements every month of the existence of the union, the disbursements running into a large amount of money and covering every proper need of the union from prizes at its parties to the printing of briefs, the payment of attorneys, and the payment of witnesses for time lost while attending trials. These records cannot fail to convince that they show organization and support of the union by the employees themselves (I 216, 228-230; II 430, 624, 718r).

Employees who were members of the executive committee of the union have been late some twenty minutes or so in returning to work after noon meetings of that committee without being docked and it is equally true that employees have been late in similar amounts of time in returning from the dentist or some personal errand without being docked. Instructors deh er work to employees and show beginners how to operate machines but have no supervisory power (IX 3122, 3195, 3206, III 743), and no more authority to report an employee than any other employee has and frequently receive less pay than operators (I 300-361, II 450-451). The price fixing committee has always had representatives of the DGWU on it, beginning with Rose Todd who had no supervisory power, and who are selected by the union (I 112-114). The Board

found that Rose Todd had no well defined duties and in the same paragraph found that her definite duties were:

> "During this period she was not assigned to any particular department, being directly responsible to Baty, the factory manager. Todd was assigned a desk in the factory—first on the ninth floor and later on the seventh floor—charged with the responsibility of keeping the various sections supplied with the necessary materials for maintaining operations and checking up on the delivery of various supplies that should be in the sections. In addition, if any of the sections were short of supplies which delayed the work, Todd was notified and arranged for the proper supplies to be forwarded to the department. These duties required that Todd move throughout the various sections of the factory and contact instructors and thread girls. For a period of 1938 Todd again worked with Dewey Atcheson on some special work." (X 3855-6.)

The action of the price fixing committee is not final and other representatives of the union have taken up complaints, including prices, with the management many times and have often been successful (I 114, 231-233, 234-238a; II 628; VII 2159-2164).

The Board has steadfastly refused to hold an election of the employees on the question of their free will choice of labor unions (I 242; IV 1336qqq; XI 3965).

The Board paid much attention to an organization called the "Donnelly Loyalty League" or the "Nelly Don Loyalty League." It was organized in February, 1935, by the employees for the purpose of resisting the spread of certain false statements about conditions of employment in the Donnelly plant and for the purpose of social intercourse between employees (I 37, 38, 42; VIII 2582, 2666, 2718, 2727, 2778, 2860, 2927; IX 3011, 3052, 3090). It never

undertook to be a labor union, to make any contracts with employers, and the fact that it did express resentment against statements repeatedly found to have been false cannot make a labor union out of it. The Board asserts that the DGWU is the League's successor, but absolutely fails to produce any evidence whatever to support such claim. The employees testified that it was not (II 704j; IX 3130, 3362). In the first place, the Loyalty League is still alive today and it has no successor (I 186-187; II 584a; VIII 2731); in the second place, the conclusion after reading the evidence cannot be avoided the DGWU would have been organized under the circumstances whether any Loyalty League existed or not. There are other social organizations among employees of the plant such as an Athletic Club (I 36), "The Pioneers" (II 409), etc., and it would be as reasonable to say that any one of them was the predecessor of the union. It is true that the one-time chairman of the executive committee of the union was also at one time president of the Loyalty League, which is a normal result of the qualities of leadership in any group. The employees did not consider her, nor the others so charged by the Board, as representative of the management (VIII 2593, 2644, 2726, 2812, 2859, 2872, 2929; IX 3058, 3092, 3122, 3195, 3208, 3218, and offer of proof, III 743, *et seq.*) It is also true that when attorneys were first employed by the employees to investigate the possibilities of injunction the first payment of retainer was made by check drawn on the Loyalty League solely as a matter of convenience, there being no bank account of employee funds other than this (I 178). But from the moment the possibility of forming a labor union was conceived of, the union proceeded on its own initiative through its own organization and raised every dime of its expenses by dues from its own members, profits from

entertainments given by itself and at its own expense (I 230; II 572, 692; IX 3232). As a matter of fact, the Loyalty League itself was the spontaneous expression of the genuine sentiment of the employees. One ex-employee (thereafter shown beyond any possible doubt to have been biased and completely and thoroughly discredited), in the first hearing offered the only testimony to the contrary which, even if true, would be no more than inference to that effect. This was Mrs. Greenhaw (brought by the Board from Portland, Indiana), who testified that there was a meeting of both the DGWU and the Loyalty League on May 25, 1937, and this was contradicted by every witness for the Company and the DGWU who was questioned on the subject. The statement was denied by Mr. McConaughey (II 704a), Mr. Crawford (III 722), Miss Green (II 718), Mrs. Weigand (II 718m-n), and many others.

One of the attorneys for the International has been quoted as stating in reference to ascertaining the choice of the employees as to a labor union, "I don't care about their choice" (V 1402). He does not agree that this is a correct quotation (V 1382), but states that he did say something to this effect, "I can conceive it is very reasonable to me that a large majority wouldn't want to join the International. I'm not asking that you put them in there. I believe sincerely that a large majority of your people don't want it," but he suggests the reason is because of their intimidation and campaign of vilification. This fits into the unavoidable picture of the entire proceedings that our opponents have realized that the actual determination at this time or at any time in the past of the free will choice of the employees would be and is overwhelmingly in favor of the DGWU, and against them.

The significant and important evidence in the first hearing was the testimony of every employee who took the stand (eight called by the DGWU and fourteen by the Company) that they formed the DGWU of their own choice and without any interference or coercion or suggestion from the employer. They gave their reasons for preferring their own union and for forming and operating it, which frequently included dislike of the violence used by the International at nearby plants and often threatened against Donnelly employees when the little plants had been whipped into line (IV 1336g, 1336vv-ww, 1336vvv; IX 3013; X 3514). Many thought the formation of their own union would not only afford protection against violence but prevent repetition of the incident in which one employee (Sylvia Hull), representing herself and only one other employee (V 1563), had attended an International convention on the pretense of representing a "Donnelly Local," and made a speech written for her by Mr. Perlstein, regional director for the International (V 1569). Rose Todd testified: "I mean the thing that prompted us to get busy and form a union of our own is the thing Sylvia Hull did" (I 254; see also I 96-97). Subsequent evidence has proven that those who believed that formation of their own union would give them protection were correct. The employees' union appeared in the injunction case against the International.

In addition to the employees who took the stand, the DGWU and the Company offered in good faith to put every one of the 1,160 employees on the witness stand who would testify to their desire to belong to the DGWU, their reasons therefor and to complete lack of interference or pressure from the Company. When this offer was refused

by the examiner the affidavits of all of such 1,160 employees to this effect were offered in evidence and refused and are in the record (VI 1677 to 1749; IX 3270).

No DGWU or Company witness who signed this affidavit has ever been impeached or shown to have committed perjury, nor to lack enough intelligence to know his choice between two unions and none has ever retracted over a period of some nine years with the exception of one *ex-employee*, a witness for the Board who several years thereafter and at the second hearing testified that she joined the International the same day she signed this affidavit, that she acted as a spy for it by reporting employee activities to the end that she committed perjury when she signed such affidavit (X 3696). She was not permitted to answer a question as to whether her husband was an organizer for the International (X 3683-4).

The second hearing of this case before the examiner for the Labor Board again took several weeks' time in the months of July, August and September of 1942. It was heard by the same examiner over the protest of the DGWU and the Company on the grounds of his prejudice (VII 2059-2063).

Its purpose as stated by the Circuit Court of Appeals (123 Fed. (2d) 215) was to take and consider the testimony of the employees as to their choice and why and how they formed the plant union. Every employee who testified reaffirmed his free choice of DGWU, gave persuasive reasons therefor and denied any interference or coercion. Again, both the DGWU and the Company offered in good faith to put every employee of the Company on the witness stand for testimony to the same effect and to prove no coercion and "to prove the successful operation of the Donnelly Garment Workers' Union since July 15, 1939" (IX 3270, 3265, 3253). Again the affidavits of all employ-

ees below the rank of supervisor as offered in the first hearing (VI 1675) were offered in evidence (IX 3270; X 3783). The examiner would not permit the DGWU to put on any witnesses whatever in its case-in-chief (IX 3255) and allowed DGWU six witnesses on surrebuttal (X 3763) on strictly limited details and not on the points of evidence which it had been directed to take by the appellate court.

In the second hearing the Labor Board put on six witnesses of its own. All of them were ex-employees. At no time has any employee testified in favor of the Board's contention in any hearing or lawsuit. Of the six ex-employees whom *the Board* put on the stand in the second hearing, one testified that she knew nothing whatever about labor relations in the plant, but that she believed it to be true that nobody connected with the management ever urged or tried to induce any employee to stay out of the International or to join the plant union (X 3660). Three readily agreed that the plant union was the voluntary preference of the great majority of the workers and that one of the primary causes of its formation was the desire to protect the members from threatened violence of the International (IX 3455 and 3463; X 3514, 3581). This was exactly the fact that they were placed on the stand for the purpose of disproving. One stated that she was not forced or threatened in any way in joining the DGWU (X 3501) but she did have a feeling that if she did not sign she might not have a job, but she explained this by saying that if the DGWU secured a closed shop contract she would then have to belong in order to have a job which, of course, means that if there was any coercion it was by the law itself (X 3529). One stated that when she signed an affidavit that she preferred the DGWU, she committed perjury (X 3690, 3703 and footnote 4, *supra*);

that on the same day she joined she notified the International, and that she acted for the International in getting information about the DGWU (X 3696, 3708). The substance of the testimony of these Board witnesses is as to their personal grievances against either the Company or the plant union, but it recognizes and supports the universal testimony of the employees that so far as the DGWU's being the voluntary, actual free will choice of the overwhelming majority of the employees, no doubt whatever exists. The testimony of these employees is discussed in more detail with citations in the argument. Thus two long hearings by the Labor Board and two substantial hearings of injunction cases by federal courts have repeatedly produced the sworn statements of all employees as to the fact of their actual choice and the reasons therefor, which testimony is actually supported on this fact by the witnesses produced by the Board for the purpose of contradicting it.

The Circuit Court of Appeals on the first hearing from the Board pointed out that the persons who formed an organization must know why they did it and that there was no presumption that they would commit perjury:

> "It was not shown that any of the employees of the Donnelly Company, whose testimony was offered, was under any disqualifying disability. There was no presumption that these employees would commit perjury, and, even if the trial examiner believed they would perjure themselves, that would not have affected the admissibility of their evidence" (123 F. (2d) 222)

and directed that the Board receive and consider this evidence as material regardless of how much weight the Board gave to it.

On the second hearing the examiner and the Board not only refused to receive any testimony whatever from the DGWU upon its case-in-chief and received no more than eleven employees called by the Company, but again refused to consider the testimony of every employee in the plant as to why she or he joined in forming or supporting the DGWU and whether she or he was in any way coerced or interfered with. It again held that all such evidence was wholly immaterial to the issue of why and how the union was formed and whether the employees preferred it as their choice. The entire opinion of the Board demonstrated that no consideration whatever was given to the extraordinary amount of the testimony of the employees and the complete lack of any contradiction of it, but we need not rely on this evidence to show that the Board again flatly refused to consider such evidence as material, in spite of the Court of Appeals' direction to that effect, by its own unequivocal declaration to that effect:

> "Since we find the testimony here adduced totally unpersuasive that the employees voluntarily designated the DGWU, we are moreover impelled to adhere to the opinion, derived from our experience in administration of that act, that conclusionary evidence of this nature is *immaterial* to issues such as those presented in this case." (Italics ours.) (A 619.)

We shall maintain that this evidence is material and is not discredited by the use of mere inference which is the Board's only method of establishing its falsity; and that a decision of the Board, which refuses to treat it as worthy of any consideration whatever in spite of directions from the supervising court to do so, cannot stand.

Our problem is whether the purpose of the Act is to be achieved by recognizing that proven choice, or whether

the Act, by regarding inferences or secondary evidence as ends in themselves, can be made to work backward, so to speak, and produce the exact opposite of its purpose.

We shall not urge that the Board need hear the testimony of every employee. As the Court of Appeals pointed out, there are well-known expedients to substitute a reasonable cross-section of a large group of witnesses for all of them:

> "There is available to him (the examiner) well-known expedients for limiting the number of witnesses where their testimony was cumulative" (123 F. (2d), l. c. 222),

nor shall we assert that the Board can be told how much weight it should give to any material evidence. But we shall earnestly submit that when the supervisory court, acting in accord with its powers and within its discretion, directs that certain important evidence be treated as material, the Board cannot explicitly refuse to follow such direction by saying that it "* * * is impelled to adhere to the opinion * * * that conclusionary evidence of this nature is *immaterial* * * *." We shall urge that the testimony of every employee in the plant to a fact within his own knowledge, without impeachment, plus majority of the six *ex*-employees offered by the Board who recite personal grievances but agree that the overwhelming majority of employees prefer the DGWU was correctly held by the Court of Appeals to be material and that the Board cannot refuse to consider such evidence and base a contrary decision wholly on inference. We believe that the Board cannot lawfully presume that every employee in the plant is a perjurer and has so continued in different hearings over a period of years without having at least some evidence for such an outrageous conclusion.

Nor can it presume that these employees do not have enough intelligence to know why they formed their own union or what their actual choice is.

Twice the Circuit Court of Appeals for the Eighth Circuit has held that the Board has not yet received and considered all of the competent and material evidence (123 F. (2d), l. c. 225, 151 F. (2d), l. c. 875). The Board has unequivocally recorded its refusal to do so.

## SUMMARY OF ARGUMENT AND QUESTIONS PRESENTED.

(1) All of the employees, numbering some 1,100, were offered as witnesses that the plant union was the free will choice of the employees and to give their reasons for forming and operating it and that they were in nowise interfered with or dominated by their employer in so doing; at least four of the seven ex-employees offered by the Board in two long hearings agree that the plant union was the actual wish and choice of the overwhelming majority of the employees; Federal Courts, after lengthy hearings or the review of lengthy hearings on appeal, have repeatedly found that the plant union was the voluntary choice of the employees; the affidavits of all employees are in the record stating that the plant union is their free and voluntary choice formed without interference and no employee has been impeached or shown to be part of any plan to testify falsely. Offers of proof of large numbers of employees giving detailed evidence and support thereof, showing successful negotiations of the Company for increases in wages, complete payment of all financial expenses by the members and no one else and many similar facts are in the record. The plant union has repeatedly petitioned for a secret election and been denied. This condition has continued over a period of years. Can the Labor Board validly disregard this evidence on the foundation of inference only?

(2) Where the statute creating the Board provides that the Court of Appeals shall have jurisdiction to control the proceedings of the Board and where this Court has held that the Labor Board must follow instructions of the Circuit Court of Appeals on a rehearing if such

instructions are not an abuse of discretion and where Congress has recently passed the Federal Administrative Procedure Act strengthening and increasing the duty of the Circuit Court of Appeals to set aside Labor Board findings reached without due process and fair trial, can the Labor Board clearly and explicitly refuse on rehearing to follow such instructions of the Appellate Court?

(3) Can the Labor Board successfully maintain that it has satisfied the burden of proof resting upon it by merely producing slight evidence by a comparatively minute portion of testimony of discredited witnesses that the *type* of incidents which it regards as associated with domination occurred without in any way meeting or contradicting the evidence of all the employees that no dominance or interference existed on the ground that when the type of action has been shown, all testimony that interference did not exist may be ignored because all witnesses contrary to the Board may be *presumed* to be unable to know their own choice, or if they do know it, it may be *assumed* that they will perjure themselves on the witness stand or by affidavit through fear of their employer.

(4) Where the Board, after instructions from the Court of Appeals to take and consider as material the testimony of the employees (or a reasonable cross-section of them where all of them are tendered) and the Board refuses to take any substantial number of such employees offered as witnesses by the Company and none at all of those offered by the intervener, gives no consideration to its value in its opinion and summarizing its findings as follows:

> "Since we find the testimony here adduced totally unpersuasive that the employees voluntarily designated the DGWU, we are moreover *impelled to ad-*

*here* to the opinion, derived from our experience in administration of the act, that conclusionary evidence of this nature is IMMATERIAL to issues such as those presented in this case."

and where such evidence is the best and most direct evidence without the consideration of which the intervener is deprived of an opportunity to present its case, is the refusal to receive it merely judicial error or a denial of due process?

(5) Where, in addition to the failure and refusal to take or consider the principal body of evidence for the taking of which the Court of Appeals remanded the hearing, it also appears that the same examiner who was influenced by bias and prejudice in the first hearing and was appointed over the protest of the intervener and the Company for the second hearing, was still activated by the same bias and prejudice and where the evidence of the employees as to violence of the International at nearby plants and threatened against them as a cause of their forming their own union, was refused in violation of the mandate of the Court of Appeals, can the Board be heard to urge that because of alleged doubt on minor grounds of denial of due process and fair trial, the court should ignore the primary and substantial grounds given by the Court of Appeals for vacating the Board's order?

## ARGUMENT.

### I.

**A decision in favor of the Board and against the intervener in this case would be a denial and a stultification of the provisions and purposes of the National Labor Relations Act, and the establishment and enforcement of the exact reverse of the principle that the Act was enacted to enforce. It would deny the support of the law to the union which is beyond question the actual free choice of the employees.**

It is axiomatic that the purpose of the Act is to support and protect employees in organizing or joining labor unions of *their own choice* rather than to force them into national unions they did not choose; or to destroy substantive rights of employees merely in order to punish employers for possible minor infractions, of which employers might or might not be guilty; or to free the Labor Board from the obligation to observe due process and the duty to actually weigh evidence. See Section 1 of the Act, which sets forth its purpose and policy:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, *self-organization, and designation of representatives of their own choosing*, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (Emphasis ours.)

The court said in *NLRB v. Sun Shipbuilding and Dry Dock Company*, 135 Fed. (2d) 15, at page 18:

> "After all, the fundamental purpose of the Act is to secure to employees entitled to its protection the right to bargain collectively through representatives of *their* own choosing." (The emphasis here is that of the court.)

See *National Labor Relations Board* v. *Gluek Brewing Company*, 144 Fed. (2d) 847, 858:

> "The grave purpose of Congress in passing this Act was to provide the means for protecting the rights of labor to organize."

See *Humble Oil Company* v. *NLRB*, 113 Fed. (2d) 85 at 92:

> "It would be strange indeed if a labor organization, freely organized by a large majority of the employees, is to be destroyed whenever some well-wishing supervisor, contrary to his own duty and orders, says something in its favor. As we see it, the employees who freely formed these organizations have the right under the law to have them function. If the employer trespasses through his representatives, he and they ought to be stopped, but a more serious and demoralizing trespass than here appears is necessary to show such domination or interference or support as will justify annihilation of such organizations."

If the employees actually reach a conclusion as to their own choice and that fact is established, just as any other fact involving mental intent is established, by reasonable evaluation of the evidence, then subsidiary facts as to whether an employer indicated a preference or made critical remarks, or employer's property was used in insignificant ways, or three or four employees considered instructors as having supervisory powers, contrary to the

impression of more than a thousand others, etc., etc., become unimportant and insufficient as grounds to set aside that choice. Where the preference of employees is actually in doubt, such subsidiary facts are, of course, valuable as secondary persuasive evidence as to whether, if some alleged choice has been made, the apparent evidence of choice is genuine, and the subsidiary facts or "badges" of domination or pretense of choice should be given due and proper weight.

Certainly the situation may exist where the fact of choice is definitely proved by any reasonable method of considering evidence, and this may be true even though the employer or employee may have taken steps beyond the boundary of strict neutrality. The fact that A might allow B to take insignificant privileges with A's property or, for that matter, that A might endeavor to urge or even bribe or threaten B in order to get B to adopt a certain position does not destroy the possibility and the right of B to actually take that position of his own free will and accord, and where an Act is passed with the purpose of securing that right to B, and where B has actually made such decision himself and expended thousands of dollars, years of work and secured valuable contract rights (III 807, 812-821, 947; II-704j-704n; II 713-714) in connection with such action, there can be no valid reason for denying him protection in such choice because someone else may or may not have acted improperly. The mental fact of choice or of good faith may be proved beyond any reasonable doubt where the evidence is sufficient and when such is the case, to continue to indulge speculative inferences that it might be all a mistake or a deception, or to give illogical importance to minor, secondary and subsidiary facts, or to assume that all employees are perjurers or lacking in ordinary intelligence is not a method of

*weighing* evidence by any theory of jurisprudence, but merely a refusal to weigh, accept, consider or be actually receptive to evidence (Trial Examiner refuses, II 718, 613-14, IX 3217, IX 3255).

It has been proved beyond any reasonable doubt in the case at bar that the overwhelming majority of the employees in 1937 and for the nine years thereafter preferred and have selected the DGWU as their bargaining representatives. Our opponents may say that this is begging the question; that what this litigation is about is the attempt to ascertain whether there was free choice, whereas the above statement merely assumes it and proposes to go on from there. Let us see if it assumes such conclusions or if it merely recognizes what otherwise one would have to wilfully close his eyes in order not to admit.

Consider the following established facts:

1. *All* employees below the rank of supervisor have repeatedly offered, in good faith, to testify that they formed the DGWU of their own choice and free will without intereference, and to state how and why they formed the DGWU. (Vol. III, pp. 764-781, 792-795, 789-791, 783, 784-787; X 3829-3834.)

2. Every employee allowed to testify so stated. (II 704c-704e, 715, 664, 655, 624, 718l-718n, 718q-718u, 718y-718z; III 722-724, 725; VIII 2566-2570, 2579-2580, 2592, 2626-2630, 2722, 2770-2772, 2817-2818, 2841-2842 and 2847, 2869-2874, 2937; IX 3060-3061, 3140.) None were impeached nor shown to have had a part in any plot or plan to conceal the truth or commit perjury. "There was no presumption that these employees would commit perjury." (123 Fed. (2d) 215, l. c. 222).

3. The affidavits of 1,160 employees, being practically all of the employees at the time of the affidavits, are in the record (Vol. VI, pp. 1677 to 1749), specifically so stat-

ing, together with other affidavits and offers of proof (III 743, *et seq.*, X 3829) to the same general effect by a large numbers of employees. See footnote*.

4. This condition has continued without interruption for nine years. The DGWU has functioned continuously during all that time, making or extending contracts with the employers, securing redress of grievances and paying every dime of its own expenses including all attorneys' fees and costs of litigation. (151 Fed. (2d), l. c. 877, X 3829-3834, II 690-696, X 3661, IX 3231, II 587-588, VIII 2594-2595, 2766, 2938, IX 3044, 3141.)

5. The Board in its first hearing of some five weeks offered two ex-employee witnesses of its own, Mrs. Greenhaw, who was completely discredited and not thereafter referred to or relied on by the Board, and May Fike, who

*The wording of this affidavit is as follows:

We, the undersigned employees of the Donnelly Garment Company and the Donnelly Garment Sales Company of Kansas City, Missouri, below the rank of officer or any position carrying with it the right to employ or discharge, again reassert under oath that it is our free, voluntary and considered wish and choice to belong to the Donnelly Garment Workers' Union and not to the International Ladies' Garment Workers' Union or any other union. We understand that there is in some quarters a disposition to question the fact that membership in our own union is our own voluntary choice, and therefore for the purpose of establishing that fact to the satisfaction of the Labor Board, the public, the International Ladies' Garment Workers' Union and any and all others who may be interested, we hereby repeat the previous demands for an election and do ourselves specifically request that a fair and secret election of employees be held for the purpose of allowing us to designate our choice of labor unions and representatives for the purpose of collective bargaining, in which every employee shall be entitled to one vote and only one, and such vote shall be absolutely secret, and any other condition which shall be fair and just.

Each signer hereby further states that he or she has either read or had read to him or her the contents of this affidavit; that he or she understands that it is an affidavit and that the decision of whether to sign it or not has been left to affiant without any coercion, persuasion, or pressure of any sort, and that affiant at the time of making this statement is a bona fide employee of the Donnelly Garment Company or the Donnelly Garment Sales Company.

Other sworn offers of proof of large numbers of employees were offered to the same general effect, denying specific charges and reciting details of fact with more particularity. (See pages 742, 755, 789, 782, 784.)

was endeavoring to secure pay for some months after her discharge.

When it came to the consideration of the testimony of the Board's witnesses, of whom there were only two having any bearing on affairs at the factory, the examiner showed a complete and absolute reversal of attitude. He was ready to accept the statements of Mrs. Greenhaw, an ex-employee, as being more convincing than the statements of all the employees at the plant. He says in his intermediate report (A. 519): "The undersigned accepts this testimony of Mrs. Greenhaw as correct for the reason that Mrs. Greenhaw, of all the witnesses who testified at the hearing, was a disinterested party. Mrs. Greenhaw was not a member of any organization while employed at the Donnelly plant. Her testimony was given in a straightforward and unhesitating manner. She has always been employed in very responsible positions and left the respondent's employ with a good record. A further reason for the acceptance of her version is that the testimony of the respondent's witnesses with respect to the calling of the meeting and the circumstances surrounding it varied substantially." Now the record shows that this witness had a definite grudge against the Donnelly Company (II, 374, 375). She was a member of the union, but not of the League, although she says members of the union and members of the League were the same people (I, 365). She felt that she should have been made secretary to one of the executives of the Company, even though she knew no such position was open (II, 374). She had originally been brought to the Company by one of the officers, who made a place for her by creating a job which did not previously exist (II, 374). In the second hearing, the Board offered six *ex*-employees (no *employee* ever testified contrary to the DGWU's claim), one of whom

stated that she knew "nothing whatsoever of the union activities in the Donnelly Garment Company" (X, 3660), but that she believed that no official or person with authority ever advised or suggested to any employee that he or she should join the DGWU or stay out of the International (X, 3660-1). Three of the remaining five readily agreed that the plant union was the voluntary choice of the employees themselves (Dorsey, IX, 3383; Skeens, IX, 3463; Copenhaver, X, 3506), although these ex-employees had various complaints against the Company or the plant union, which they were eager to discuss (Dorsey, IX, 3383; Skeens, IX, 3462-3). Neither of the remaining two denies that the overwhelming majority of the employees organized the plant union of their own free choice, although they personally did not approve of such union at the time of their testimony more than five years later (X, 3492 to 3529; X, 3581). Mrs. Weilert states that she believed the organization was formed by the voluntary action of the employees at that time, and that her husband had written a letter at her dictation repeating the assertion that her action in union matters was voluntary and according to her own wishes (X, 3581; X, 3591, 3690). The last witness of this group, May Stevens, stated that as far as she was concerned personally she committed perjury several years previously when she made an affidavit that the DGWU was her own choice (X, 3690); that she joined the International the same day she signed the affidavit (X, 3696, 3708); and for some time secretly furnished information about Donnelly employees to the International (X, 3708). Their memories were refreshed some five years after the events to which they testified, by the International or the Board representatives a few days before the hearing (Dorsey, IX, 3369; Skeens, IX,

3466; Copenhaver, X, 3520; Stevens, X, 3685), and they admitted bias (Skeens, IX, 3447; Weilert, X, 3564; Stevens, X, 3696, 3708), and even hatred (Dorsey, IX, 3364, 3365). They also admitted that the violence of the International threatened against Donnelly employees was a substantial cause of the formation of the plant union (Copenhaver, X, 3514; Weilert, X 3581; Skeens, IX, 3455).

6. Federal Courts have four times heard, or considered on appeal evidence in each of four different hearings, each of which occupied five of six weeks, in injunction cases on this same general dispute between the same parties or on appeals from Labor Board hearings, and have repeatedly found as a fact from that evidence that the DGWU was the voluntary choice of the employees, uninfluenced by the employer.

See, 21 Fed. Supp. 807, at 809:

> "The employees of the Donnelly Garment Companies, over 1300 in number, have completed an organization known as the 'Donnelly Garment Workers' Union.' They have negotiated with their employers a contract which provides specifically for the wages, hours, terms and conditions of their employment that are entirely satisfactory to both parties. So far as this hearing shows, they are unanimous in this attitude, and have declared their opposition to affiliation with the defendant union, or with any other unrelated organization. Among these employees there are no members of the defendant union shown by the evidence, and no division exists among them. *The proofs overwhelmingly establish that they are neither company inspired nor dominated.*" (Italics ours.)

and 119 Fed. (2d) 892, at 893:

> "In considering the question of jurisdiction, we accept as established the following facts: * * * That the defendants have at all times during the existence

of their controversy with the plaintiffs insisted that the Donnelly Garment Company disregarded the wishes of its employees with respect to representation for purposes of collective bargaining, that it recognize the International as the exclusive bargaining agent for all of the Company's employees, and that the Company disregard the contracts which it has entered into with its employees, through their independent union, relative to representation, hours, wages and working conditions."

and 151 Fed. (2d) 854, at 877:

"For more than seven years the employees have defended the plant union, at great expense to themselves, before every tribunal in which its integrity has been called in question. Throughout this period they have been fully advised of their rights under the National Labor Relations Act. There have been no defections from their ranks. None of them permitted to testify has been impeached on the witness stand. The credibility of none of them has been attacked. Five years after the organization of the plant union all of its members have testified to their deliberate choice of it as their agency for collective bargaining with their employer. In this situation there is no room, in my opinion, for the inference that these employees have been, and continue to be the victims of an illegal coercion by means unknown to them and too subtle to be susceptible of proof, or for the inference that they have surrendered their right freely to choose their labor affiliation in return for the occasional inconsequential use of the Garment Company's telephone, mimeograph machines, and office facilities."

and Vol. V of the record, being a part of the findings of Judge Miller, at page 1616e:

"Shortly after the Supreme Court of the United States sustained the validity of the National Labor Relations Act, and on April 27, 1937, one hundred per cent of plaintiffs' employees (other than officers,

executives and those with authority to hire or discharge) voluntarily formed and became members of the Donnelly Garment Workers' Union, and unanimously designated and selected the nine members of the Executive Committee of said union as their sole representatives for the purposes of collective bargaining with plaintiffs in respect to rates of pay, wages, hours of employment and all other conditions of employment, and all matters for their mutual aid and protection. Said employees have at all times freely administered and maintained said union. At the time of the formation of said union and at all times since, none of said employees have been or are members of the defendant International."

See 55 Fed. Sup. 587, at 590:

"There can be no doubt that at the time an overwhelming majority of the Donnelly Company employees, numbering some 1,200, were entirely satisfied with their working conditions and wages, and only a small minority had professed any interest in the International's organizational activities."

We submit that federal courts in this country are sufficiently competent and reliable judges of evidence to insure that where a dispute on the same subject between the same parties has been tried before them or appealed to them four times, as a result of four hearings of five or six weeks each and one of about one week, and where the trial courts, or the appellate court on review of such exhaustive evidence have repeatedly found that the employees formed their union of their own free will and choice without interference, and have never found to the contrary, although they have sometimes made no finding at all on that point, that particular point may be safely regarded as an established fact.

While no federal court has held to the contrary, the Labor Board has twice reached an opposite conclusion by the expedient of totally disregarding and considering as wholly immaterial the repeated testimony of every employee in the plant as to his or her choice in what he or she said were the causes and reasons for the formation of the plant union (A. 619, 603). These causes included resentment against the violence being used by the International at smaller plants some six or eight blocks away and being threatened against these employees when the small plants were whipped into line, their desire to run their own affairs, and resentment at the announcement that Sylvia Hull was to represent Donnelly employees or the "Donnelly Local" at an ILGWU convention at a time when none of the employees had any knowledge of any ILGWU organization within their plant, nor any desire to belong to such an organization when, as later developed, Sylvia Hull represented only one other employee besides herself. (VIII, 2573-2576, 2644-2645; V, 1562-1563, 1566.) Perlstein and another prepared her convention speech and resolution. (V, 1569-1570; VIII, 2712, 2720, 2929, 2997; IX, 3088.

7. All other evidence of the Board is merely inference from facts which may be used to indicate whatever preconceived interpretation either side may put upon them or from alleged facts which were found or supported by generally discredited testimony and against overwhelming unimpeached testimony to the contrary. (See the detailed offer of proof of a great majority of employees: III, 743-763.)

8. The Board and the ILGWU have repeatedly denied petitions for secret elections as petitioned for by the DGWU or offers to submit, if the International would join, to the result of any fair and secret election. (A, 409, 560; X, 3844; XI, 3965; IV, 1336qqq; I, 242; III, 783.

The Board will doubtless defend its refusal to grant an election over a period of nine years by saying that the Board does not hold elections while a charge of domination is pending. But this does not prevent the International from agreeing to such a test if it really wants or is willing to risk the answer being developed. If a secret election, so controlled that no one will know how any individual employee votes, will not determine, or at least throw great light on that fact, then no method of investigation will do so. If our opponents feel that the election should be delayed until sometime in the future when they feel that they might win, it would be equally reasonably to delay still longer because thereafter the employees might be converted to still a third point of view. The logical position is that the employees are entitled to their choice now, without burden or prejudice, and have been so entitled for the past nine years.

However, the denial of an election does somewhat limit the alternative positions left to the Board. It is hardly logical for the Board to deny petitions for a secret election made by substantially all the employees over a period of several years and then when the employees go on the witness stand or present affidavits as to their choice and how and why it was made, to claim that such evidence is inconsequential and immaterial because it is a violation of the principle of secret elections. (Examiner, *supra*, II, 7, ob.) The validity of a labor union does not depend on certifications by the Board, nor on the Board's holding an election, nor does the law hold that its valid existence, and right to be treated as such, cannot be established by the union itself, nor found as a collateral court proceeding. It is equally true that where the Board, without an election, makes a finding without due process, or in direct violation of the directions as to material evidence by its

supervisory court, acting within its discretion, or in open disregard of common sense, weighing the probative value of evidence, all of which exist in this case, its orders and findings must be set aside.

The Board might undertake to claim that all employees are perjurers, but with no evidence whatever on which to base such a charge, it would be difficult to support, and the Board, in this case, makes it only by inference, when it says that employees who know the employer has representatives in court will be afraid to tell the truth under oath or in affidavits. This still claims that the employees are perjurers, but suggests that the cause is fear rather than bribery or something else. If the evidence of choice of the employees were less decisive or had existed only briefly during a period of excitement or fluctuation, or the question put to them was not clear, or there was reason to believe that the result was only temporary, or there were evidence of fear or bribery, then an argument might be based on such situation to indicate that the result was unreliable and secondary evidence of inference might be important. The Board, however, has recognized that to actually weigh the sworn clear and reasonable testimony of all the employees without any impeaching evidence against them, or any of them, against inferences that they might have been dominated by such petty instances as are bound to happen among hundreds of employees over a period of years, would make it logically impossible to find against the overwhelming direct evidence. The burden of proof is still on the Board. It could not be met by the inference resulting from the fact that four or five ex-employees with admitted bias and who had their memories refreshed by International organizers five years after the facts occurred, had the impression, contrary to everyone else, and the sworn statements of all who knew the fact,

that Rose Todd or Hobart Atherton, or someone else had a position of authority, or that the instructors had such place, or that Rose Todd was representing the employers and not her union on the piece work committee, or that committee members were not docked when a few minutes late from committee meetings, just as they were not docked when late from the dentist's office or other personal errands. Employees were regularly allowed to transact business while at the plant. (II, 719-720; VIII, 2643-2644, 2693; VIII, 2621-2622; VIII, 2579-2580.)

Thus the Board retreats to two desperate and untenable positions: (1) That employees do not have enough intelligence to make a choice. They cannot know whether they prefer A to B after months of consideration, as their bargaining representative (or, if they can, it may be assumed that they will state it untruthfully). Therefore, the Board will make such choice for them. Perhaps instances might arise in which the question was not clearly put to them or the result was a fluctuating or uncertain one, as suggested above, but that is not the case here. The Act clearly contemplates that it is the employees' *own* choice which is to be enforced, regardless of whether the Board or the International believes they used sound reasoning and made the choice they should have made or not. (Section 1 of the Act, quoted *supra*.) Nowhere in the law is it held that the Board should make the choice for them.

*NLRB* v. *Sun Shipbuilding*, 135 Fed. (2d) 847.
*Humble Oil* v. *NLRB*, 113 Fed. (2d) 85.
*Ballston-Stillwater Knitting Co.* v. *NLRB*, 98 Fed. (2d) 758.
*NLRB* v. *Swank Products*, 108 Fed. (2d) 872.
*NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332, 83 Law Ed. 682.

*Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 83 Law Ed. 126.
*NLRB* v. *Gluek Brewing Co.*, 144 Fed. (2d) 847.
*Donnelly* v. *NLRB*, 151 Fed. (2d) 854 at 877.
*L. Grief & Bro.* v. *NLRB*, 108 Fed. (2d) 551.
*NLRB* v. *Lion-Shoe Co.*, 97 Fed. (2d) 448.
*NLRB* v. *Union Pacific Stages*, 99 Fed. (2d) 153.
*Magnolia Petroleum Co.* v. *NLRB*, 112 Fed. (2d) 545.

(2) That it makes no difference what the choice of the employees is. They are no longer entitled to it if the employer has done or said something which might conceivably in other situations have dominated the employee. This would be carrying the "impure atmosphere" doctrine to such absurd lengths that it would always be possible for an employer to defeat any union of which he did not approve by the simple expedient of *favoring* it. He could do this by one speech or half a dozen minor actions without leaving any possibility of discovering his inner purpose. No organization of hundreds of employees over years of time will ever be valid if the greatly outweighed testimony of a few biased witnesses as to acts or circumstances which might by inference have spelled domination in some circumstances can overcome clear and overwhelming and persisting evidence of genuine and actual freedom of choice.

The Board is not enfitled to ignore the established principles of common sense as to evidence to the extent of disregarding the sworn testimony of any number of witnesses who know the fact and who are not impeached or discredited or contradicted on the basis of mere inference, suspicion or conjecture based on disputed facts which could certainly exist concurrently with the truth stated by such witnesses. (See *Cupples* v. *NLRB*, 106 Fed. (2d) 100, l. c. 104:)

"We shall attempt to make a fair statement of what we consider to be the important facts disclosed by the evidence, keeping in mind that, while the burden of proof was upon the Board, it is entitled to have the evidence and all reasonable inferences which may be drawn therefrom viewed in the light most favorable to its conclusions; that questions involving the weight of evidence and the credibility of witnesses were for it to determine, but that evidence which merely furnishes grounds for suspicion and conjecture proves nothing, and that the Board, like a jury, *may not disregard the uncontradicted testimony of unimpeached and credible witnesses.*" (Italics supplied.)

As a footnote following the above quotation the court added:

"The testimony of a witness not shaken on cross-examination and not contradicted by any witness, fact or circumstance, must be accepted as true. (*Woodward* v. *Chicago M. & St. P. Ry.*, 8 Circ., 145 F. 577, 582.)"

*Humble Oil Co.* v. *NLRB*, 113 Fed. (2d) 85, at 92 (quoted *supra*).

*NLRB* v. *Mathieson*, 114 Fed. (2d) 796, l. c. 801:

"The Board makes reference to the fact that respondent permitted the association to hold the election for members of its council on company property. At that time, however, the association already had a clear majority of the employees; and this could not have influenced the obtaining of the majority * * *

While it may have been better for the election to have been held at some other place, we cannot see that this circumstance is sufficient, either alone or in connection with other circumstances, to support the conclusion that the association is dominated by respondent."

The fact that the records of the association were kept in respondent's vault is utterly without significance when considered, as they must be, in the light of surrounding circumstances."

*NLRB* v. *A. S. Abell*, 97 Fed. (2d) 951, l. c. 957:

"In this respect the burden of proof was upon the union, and while the charge was supported only by conjecture and suspicion, it was refuted by positive and direct testimony. The failure of the Board to credit this testimony does not supply the lack of affirmative proof of unfair labor practice on the part of the employer."

*NLRB* v. *Vincennes Steel Corporation*, 117 Fed. (2d) 169, l. c. 174:

"We fail to find any evidence as to the number of employees, office help and supervisory officials who had cars, but we assume the number was more than six. We think the incident is without material significance. It does not furnish the basis for a healthy suspicion, much less a reasonable inference."

See, also:

*St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73, 56 S. Ct. 720, 80 L. Ed. 1033.

*Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304-305, 57 S. Ct. 724, 81 L. Ed. 1093.

*Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 393, 58 S. Ct. 344, 82 L. Ed. 319.

*Morgan* v. *United States*, 304 U. S. 1, 14, 15, 58 S. Ct. 773, 999, 82 L. Ed. 1129.

*Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 177, 61 S. Ct. 908, 923, 85 L. Ed. 1251.

*Interstate Commerce Commission* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 88, 102, 30 S. Ct. 651, 656, 54 L. Ed. 946.

*St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 75, 78, 56 S. Ct. 720, 736, 737, 80 L. Ed. 1033.

*Ohio Bell Telephone Co.* v. *(Public Util.) Commission*, 301, U. S. 292, 304, 305, 57 S. Ct. 724, 730, 81 L. Ed. 1093.

If the methods of procedure were treated as an end in themselves and as more important than the purpose of the Act which is to support the actual choice and right of employees to select and deal through the bargaining agency of that choice, whenever and however that fact clearly appears, then the tail would wag the dog. The length of court decisions on labor cases demonstrates that no secondary detail such as the possible use of employer's property in petty ways is conclusive, for if it were most labor cases could be decided in five lines of opinion. Such arguments from inference are useful only to aid in determining the fundamental fact of free choice of the employees without domination and when such fact is established, the inference from details of procedure ceases to have decisive weight.

If we correctly understand the Board's position, it is that all it need do is to show *the type* of actions commonly associated with domination. This meets and satisfies the burden of proof resting upon the Board and the case is over. If, per chance, the employees and all of them wish to testify to the contrary (III 743-763), the law holds that they do not know their own minds, or, if they do, then it may safely be assumed that they are unable to testify truthfully and cannot speak freely in the presence of their employer. See the statement of the Board's position by

its attorney, quoted in the footnote to the opinion below, 151 Fed. (2d) l. c. 872:

> "It is the Labor Board's duty to show the acts of the employer are the type that interfered with, restrained or coerced; * * * the employees who have been the subject of unfair labor practices really become so interfered with or dominated that they do not know their own minds, even assuming they were able to speak in the presence of the employer freely. It is our position they cannot speak freely in the presence of their employer. * * *"

Thus, if the Board finds on the testimony of half a dozen biased and discredited ex-employees that they had certain impressions or that certain secondary facts occurred from which inferences might be drawn, then any amount of contrary, direct testimony is *presumed* to come from their lack of ability to know their own minds or, as an alternative, it might be *assumed*, without any evidence to that effect, that they are committing perjury. We think there is no authority for this position.

Now, of course, a litigant is entitled to try to prove that this picture does not prove what it seems to be. But in undertaking to destroy or weaken the sworn testimony of everyone having knowledge of the particular fact to be developed such litigant should certainly expect to affirmatively show that the records made by these people were not in the substantial number claimed, or that their attitude only lasted a week or two, or that at least some of the witnesses were not worthy of belief, or by cross-examination to show their insincerity or to affirmatively produce evidence of some plot by them to misrepresent the facts. But to simply shrug off the testimony on the implication that everybody knows that cannot be true, or on the inference that the actions of supervisors or employer

might have bribed or dominated the group in some sets of entirely different circumstances, but with no evidence that it did so here, is simply no answer to this evidence whatever. One does not get rid of overwhelming, unimpeached, sworn testimony of self-respecting American citizens so easily.

The purpose of the law is not to empower either the International or the DGWU to increase its organization but to enable this group of employees considered as human beings, to proceed in labor matters as it chooses, without penalty either from the company, the International or the Labor Board.

*L. Grief & Bro.* v. *NLRB*, 108 Fed. (2d) 551, l. c. 558:

> "It is not an answer to point to circumstances indicating that the management preferred an inside to an outside union, or that citizens in the community entertained a hostile feeling toward the Amalgamated. It goes without saying that the determination of the employees to form their own association and to be free from the outside interference of a national union was influenced by their past experience in the plant, and by the general opinion in the community of which they are a part; but these contacts did not deprive them of their rights under the Act, or require them to choose bargaining representatives offensive to their employer or to their fellow citizens, so long as their choice was not dominated or interfered with by the employer."

See also *Quaker State Oil* v. *NLRB*, 119 Fed. (2d) 631, l. c. 632.

In *NLRB* v. *Sun Shipbuilding and Dry Dock Co.*, 135 Fed. (2d) 15, at page 25, the court said:

"The term 'evidence' as used in this connection means 'substantial evidence,' that is, 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' (*Consolidated Edison Co. of New York* v. *National Labor Relations Board*, 305 U. S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126) and affords "a substantial basis of facts from which the fact in issue can be reasonably inferred' (*National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299, 59 S. Ct. 501, 505, 83 L. Ed. 660). See also *Quaker State Oil Refining Corp.* v. *National Labor Relations Board*, loc. cit., *supra*, and *Martel Mills Corporation* v. *National Labor Relations Board*, 4 Cir. 114 F. (2d) 624, 627-629. While it is for the Board, therefore, to find the facts and to draw material inferences from the evidence (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271, 58 S. Ct. 571, 82 L. Ed. 831, 115 A. L. R. 307), it is for a reviewing court to say whether the Board's findings are supported by substantial evidence and whether its conclusions are reasonably inferable from the evidence which it accredits. Guided by these standards, it is our opinion that the Board's findings of unfair labor practices on the part of the respondent are not supported by substantial evidence."

The so-called determination of whether substantial evidence exists which proceeds by blankly ignoring the testimony of any number of those who must know whether they were dominated (see foot note) although that testimony has not been weakened by impeachment or cross-examination, and promptly accepting in contradiction

See opinion of Court of Appeals remanding this case, 123 Fed. (2d) 215, at 222.

"The individuals who form an unincorporated association certainly should know what sort of an organization it is, how it happened to be formed, who influenced its formation and who controls it."

thereto small bits of frequently disputed testimony as to minor details, which could be no more than inferences or basis for persuasion in a close case and each bit of which is obviously colored by prejudice, and frequently contradicted by a much larger number of employees, is simply not a determination that substantial evidence exists but a refusal to determine that fact and a headlong, biased conclusion without *weighing* evidence at all. The Board has itself recognized that absurd methods of weighing evidence are not actually the consideration of evidence.

In *Bahan Textile Machinery Co., Inc.*, v. *United Electrical Radio and Machine Works of America*, case No. C-2209, 43 NLRB 97, 11 Labor Relations Reference Manual 6, the trial examiner accepted the testimony of two witnesses in one respect when contradicted by two other witnesses and in another respect accepted the testimony of the second two when contradicted by the first two. The Board said:

> "Although the trial examiner had the opportunity at the hearing to observe the witnesses, we cannot agree with his resolution of the conflicts in testimony. The record affords no basis for believing Kirby and White, in one respect, when contradicted by Bedenbaugh and Thomason, and for accepting the testimony of Bedenbaugh and Thomason, in another respect, when contradicted by Kirby and White. Moreover, standing alone, the uncontradicted testimony of Thomason, that Bedenbaugh told the respondent's employees that they did not need the assistance of a union to obtain an increase in pay, is of insufficient probative value to support the allegations of the complaint. Under the circumstances, therefore, we are unable to find that the alleged unfair labor practices have been established by the record. Accordingly, we find that the respondent has not interfered with, restrained, or coerced

its employees in the exercise of the rights guaranteed in Section 7 of the Act. We shall, therefore, dismiss the complaint."

We do not mean to argue that the existence or non-existence of substantial evidence is a question which can be determined by a pair of scales or a foot rule, or any mechanical process not involving the use of enlightened judgment, but, on the other hand, it is equally not a matter subject only to the unreasoning individual fancy or the prejudice of the trier of the fact. It is governed by legal principles, common sense and experience and the results reached must come within the bounds of such principles in order to be valid and sustained by a higher court. For example, the result must be based on a consideration of *all* the evidence and not on exclusive preoccupation with a particular part only. See the case of *NLRB* v. *Union Pacific Stages*, 99 Fed. (2d) 153, at 177:

"It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10 (e) of the Act, 49 Stat. 453, 29 USCA, Sec. 160 (e), which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at *by accepting part of the evidence and totally disregarding other convincing evidence*.

"We are bound by the Board's findings of fact as to matters within its jurisdiction, where the findings are supported by substantial evidence; but we are not bound by findings which are not so supported. 29 USCA, Sec. 160 (e) (f); *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142, 57 Sup. Ct. 648, 650,

81 L. Ed. 965 * * *. Substantial evidence is evidence furnishing a substantial basis of facts from which the facts in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. *Cf. Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 339-343, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819." *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 4 Cir., 93 F. (2d) 985, 989.

"'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration *all the facts* presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, *considering them in their entirety and relation to each other*, arrives at a fixed conviction.

"The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless *all of it is weighed* in its totality, errors will result and great injustices be wrought. *National Labor Relations Board* v. *Thompson Products, Inc.*, 3 Cir., 97 F. (2d) 13, 15." (Italics ours.)

See *Donnelly Garment Company* v. *NLRB*, 123 Fed. (2d) 215, at 224:

"The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until *all* competent and material evidence proffered by the parties has been received and considered." (Italics ours.)

See *NLRB* v. *Indiana & Michigan Electric Co.*, 87 Law Ed. 579, at 592:

> "Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support its findings, is heard and weighed."

For example, evidence that A shot a revolver at B with the intention of killing him and that the shot actually did kill him, if considered alone to the exclusion of other material evidence, is not necessarily substantial evidence that A is guilty of murder. Other material evidence if admitted may show self-defense so conclusively that it cannot be said that there is *any* substantial evidence of murder.

In the case at bar the Board not only failed to consider all the evidence, including the primary evidence (the testimony of the employees themselves as to their mental intent), but it even refused to admit it in substance, in defiance of the direction of the reviewing court, and reasserted in its second opinion that it flatly refused to consider it material.

In its first opinion the Board said (V. A., p. 603):

> "The respondent and the DGWU contend that its employees formed and joined the DGWU of their own free will in order to resist unionization by the ILGWU and were not coerced or interfered with in their choice of the DGWU or in their rejection of the ILGWU. In support of this contention they sought to introduce the testimony of the members of the DGWU that they were not dominated by the respondent but formed, joined and supported the organization of their own free will. They also offered evidence to show that the employees knew of the violence accompanying the ILGWU organizational campaigns at other garment factories and

of threats by ILGWU representatives that the same tactics would be used at the respondent's plant and formed the DGWU for that reason. The trial examiner refused these offers of proof, ruling that such testimony was irrelevant and immaterial to the issues. We have affirmed the rulings of the trial examiner on those offers of proof * * *."

On the appeal the Circuit Court of Appeals pointed out and specifically ruled that such evidence was relevant and material and that it must be taken and given due consideration in any valid decision of the case.

See 123 Fed. (2d) 215, l. c. 222:

"It was not shown that any of the employees of the Donnelly Company whose testimony was offered was under any disqualifying disability. There was no presumption that these employees would commit perjury, and, even if the trial examiner believed that they would perjure themselves, that would not have affected the admissibility of their evidence. It is elementary that there is a distinction between the admissibility of evidence and its weight or sufficiency. *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 5 Cir., 98 F. (2d) 870, 871. Surely, if the testimony of an employee which tends to prove that an employer interfered with or supported the organization of an independent union is admissible, the testimony of an employee which tends to disprove domination and support of such a union by an employer is equally admissible. Evidence is relevant if it tends either to prove or disprove any issue in the case. We do not say that the trial examiner was required to take the same testimony from 1,200 witnesses. There were available to him well-known expedients for limiting the number of witnesses where their testimony was cumulative."

And at page 225:

> "Our conclusion is that the petition of the Board for enforcement of the order under review must be denied. We think that the least the Board can do, in order to cure the defects in its procedure caused by the failure of the trial examiner to receive admissible evidence, is to vacate the order and the findings and conclusions upon which it is based; to accord to the petitioners an opportunity to introduce all of the competent and material evidence which was rejected by the trial examiner; and to receive and consider such evidence together with all other competent and material evidence in the record before making new findings and a new order."

In its second opinion rendered on the rehearing as directed by the Court of Appeals in the above opinion the Board said it had admitted the evidence in question. This was hardly accurate since in fact it admitted only eleven employee witnesses for the company and none for the DGWU in its direct case, and only six on surrebuttal on strictly limited details not on the point of evidence directed to be taken by the appellate court. Certainly this cannot be considered any reasonable cross section of the testimony of 1,200 employees. The Board says it considered such evidence, although the entire opinion shows that it did not give two lines of serious consideration to the actual force or value of such evidence. This is true of both reports of the examiner and both reports of the Board, which included a great many pages of discussion of the evidence. Then the Board makes the actual situation perfectly clear and beyond question by adding in its second opinion the following (see Vol. A, p. 619):

> "Since we find the testimony here adduced totally unpersuasive that the employees voluntarily desig-

> nated the DGWU, we are moreover impelled to *adhere to the opinion*, derived from our experience in administration of the act, that conclusionary evidence of this nature *is immaterial* to issues such as those presented in this case." (Italics ours.)

In other words, the Court of Appeals is mistaken when it says this evidence is material. It is, of course, absurd for a trial body which is authoritatively told that certain evidence is material and its weight as such must be considered, to say, "I know that it is *not* material." And that, "I adhere to my former opinion." If it is immaterial, whether in legal or layman's language, its weight is inconsequential, or more accurately, nonexistent, and the body acting on the persistent belief and declared principle that material evidence is immaterial *cannot* give it proper weight. It is excluded before it ever reaches the scales of judgment for any deliberate estimate. Yet there can be no doubt that the court correctly stated the law.

See, also, *Martel Mills* v. *NLRB*, 114 Fed. (2d) 624, at 631:

> "Obviously, our chief guide is the words of the witness under oath *who undertook to disclose the workings of his mind.*" (Italics ours.)

The question is thus frankly presented whether the appellate court has any control whatever over the administrative board. The point that the Court of Appeals' findings and directions became the law of the case and just as binding as any other law, is discussed elsewhere herein.

It is likewise true that the fact-finding body is not entitled to repeal the principle of the burden of proof. If two equally probable but inconsistent inferences are possi-

ble from the same set of facts, then ordinarily a finding cannot properly be based upon either of them and the party bearing the burden of proof has failed to establish his position. See *Penn. Railroad Co.* v. *Chamberlain*, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819, at 823:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover." (Citing cases.)

See, also, *Smith* v. *First National Bank*, 99 Mass. 605, 611, 97 Ann. Dec. 59:

> "There being several inferences deducible from the facts which appear, and equally consistent with all these facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of these propositions against the other is necessarily wrong."

It can hardly be urged in the case at bar that the complainant ever reached the point of a state of facts from which a reasonable conclusion in its favor might be drawn when actually *considered in the light of the contrary evidence*. The inference from a number of minor circumstances that the employees might be dominated by the employer and that all of the employees are perjurers

simply cannot be said without completely departing from reason, to be entitled to be seriously compared with the infergnce that several hundred unimpeached, uncontradicted witnesses without exception who know the fact are telling the truth. Obviously, if two different inferences may be reasonably founded upon an established fact and one may be shown to be overwhelmingly more probable, then the trier of the fact is not entitled to say under the guise of considering whether there is substantial evidence that he will arbitrarily place reliance on evidence which established rules and experience show to be discredited and no longer worthy of belief. (See *NLRB* v. *Sands Manufacturing*, 83 L. Ed. 682, 306 U. S. 332, and *NLRB* v. *Bell*, 98 Fed. [2d] 406, 410.)

We have quoted the Cupples case, *supra*, to the effect that evidence which merely furnishes ground for suspicion, does not entitle the Board to disregard the uncontradicted testimony of unimpeached and credible witnesses. See, also, *Foote Bros. Gear and Machine Corp.* v. *NLRB*, 114 Fed. (2d) 611, at 621:

> "Undoubtedly, the rule is well established that a finding by referee, trial court, or administrative board if supported by substantial evidence should be accepted by an appellate reviewing court. This does not relieve the appellate court, however, of the duty of examining the evidence to ascertain whether the findings is supported by evidence. And an examination of the evidence necessitates an analysis which to a certain extent is a weighing of such evidence. In fact, the court's duty to make this examination and anaylsis of the evidence is quite as clear (even though more burdensome and involves the tedious study of testimony and witnesses' qualifications and biases, etc.) as the construction and application of statutes or any other legal question. Evidence, to be substantial, 'Must be enough to justify, if the trial

were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.". (Citing cases.)

In *Pennsylvania Railway* v. *Chamberlain* (*supra*), at page 823 of the L. Ed., the court says:

"And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions, of which the following are examples: *Wabash R. Co.* v. *De Tar*, (C. C. A. 8th) 141 Fed. 932, 935, 4 LRA (N. S.) 352; *Ragsdale* v. *Southern R. Co.*, (C. C.) 121 Fed. 924, 926; *Cunard S. S. Co.* v. *Kelley*, (C. C. A. 1st) 126 Fed. 610, 617; *Frazier* v. *Georgia R. & Bkg. Co.*, 108 Ga. 807, 33 S. E. 996; *Bowsher* v. *Grand Rapids & I. R. Co.*, 174 Mich. 339, 344, 140 N. W. 524; *Rashall* v. *St. Louis, I. M. & S. R. Co.*, 249 Mo. 509, 522, 155 S. W. 426; *George* v. *Mo. Pac. R. Co.*, 213 Mo. App. 668, 674, 251 S. W. 727; *Stines* v. *Dillman*, .... Mo. App. ...., 4 S. W. (2d) 477, 478; *Akerson* v. *Great Northern R. Co.*, 158 Minn. 369, 374, 197 N. W. 842; *Butterfield* v. *Trittipo*, 67 Ind. 338, 343, 344; *Blid* v. *Chicago & N. W. R. Co.*, *supra*, 99 Neb. 691-693, 131 N. W. 1027). A rebuttable inference of fact, as said by the court in the Wabash R. Co. case, 'must necessarily yield to credible evidence of the actual occurrence.' And, as stated by the court in *George* v. *Missouri P. R. Co.*, 213 Mo. App. 668, 251 S. W. 729, *supra*, 'It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences'."

In short, where a substantial number of witnesses who know the facts testify and are neither impeached nor discredited, the Board is not free to repeatedly refuse to consider such evidence as material and to use subsidiary facts which are the basis of inferences as a ground for finding the opposite. Where the Board, having perhaps become somewhat partisan in the heat of battle, evolves rules of evidence of its own, or disregards principles of evidence based on the experience of mankind and makes a finding which cannot be supported by logical reason or the experience crystallized in the principles of law, then that finding must be set aside. It is submitted that that is the situation in the case at bar.

But even without this the Board's order should be set aside and its complaint dismissed because it has treated and ruled as *immaterial* and of *no weight,* evidence, without the consideration of which *as material and of value* the law holds that no judgment in favor of the Board can be valid or sustained.

## II.

**When the Court of Appeals on the first appeal from the Labor Board expressly directed that the testimony of employees should be considered material evidence on the rehearing, such ruling became the law of the case, and the refusal of the Labor Board to comply with it makes it necessary that the order of the Board be set aside and its complaint dismissed.**

**(a) The situation in the case at bar.**

**(b) The application of the rule.**

**(c) The Indiana and Michigan electric case.**

**(d) The effect of the Administrative Procedure Act.**

**(a) The situation in the case at bar.**

The situation presented by the first review proceeding, as stated by the Circuit Court of Appeals (123 Fed. (2d), l. c. 222) was that:

> "At the hearing before the Trial Examiner, the petitioners proffered the evidence of the employees of the Donnelly Company, some 1,200 in number, to show how and why they formed the Donnelly Garment Workers' Union, to show that no influence was brought to bear upon them by the employer either in the formation or administration of the Union, to show what the president of the Company had said to them at a mass meeting in the spring of 1937, to show that their freedom to organize and to choose their own representatives for the purposes of collective bargaining had not been interfered with by their employer, and to show that their union, both in its formation and administration, was exclusively controlled and supported by them. The Trial Examiner refused to receive this evidence. He permitted the petitioners to make formal offers of proof."

With respect to such situation the court said:

> "We have no doubt that the testimony offered by the petitioners in their efforts to prove that the employees of the Donnelly Company formed the Donnelly Garment Workers Union *of their own free will* and that the *formation and administration* of that union was free from employer influence, domination and support, and to explain how and why they came to organize the union, was *competent, relevant* and *material* and should have been received. The individuals who form an unincorporated association certainly should know what sort of an organization it is, how it happened to be formed, who influenced its formation, and who controls it. We think there can be no doubt of the right of the members of such an organization to testify to such matters, and that their evidence is admissible regardless of its weight." (Italics ours.) (l. c. 222.)

That court then said:

> "That a refusal by an administrative agency such as the National Labor Relations Board to receive and consider competent and material evidence offered by a party to a proceeding before it, amounts to a denial of due process is not open to debate. (Citing cases.)
>
> "The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered." (l. c. 224.)

The express holding of that court was:

> "Our conclusion is that the petition of the Board for enforcement of the order under review must be denied. We think that the least that the Board can do, in order to cure the defects in its procedure

caused by the failure of the Trial Examiner to receive admissible evidence, is to vacate the order and the findings and conclusions upon which it is based, to accord to the petitioners an opportunity to introduce all of the competent and material evidence which was rejected by the Trial Examiner, and to receive and consider such evidence together with all other competent and material evidence in the record before making new findings and a new order." (l. c. 225.)

Clearly and explicitly, the Court of Appeals on the first appeal directed the Board to do three things: (1) To vacate its order. (2) To receive all of the evidence specifically pointed out and determined to be material. (3) *To consider* this evidence in the light of and together with all of the material evidence before making new findings and a new order.

The Board did vacate its first order. Obviously, the Board did *not* do either of the other two things. On the point of receiving the evidence it allowed some eleven employees offered by the company to testify, but *none whatsoever* of those offered by the organization of the employees themselves—being substantially the entire group of employees. The ruling at IX 3255, which was made before the intervener had an opportunity to offer any testimony, is:

"Then, I will now determine that I have heard enough employee witnesses, both as to the respondent and the intervener.

So, that disposes of that matter."

It is curious enough that this action of the examiner followed repeated prior declarations that he was going to hear the evidence of the 1,200 employees and hear it first (VIII 2561; X, 3956, 3959, 3960). He never did.

No intention to hear either any reasonable number of such a group or to allow any reasonable cross-section of it to testify or use any method to obviate the necessity of hearing all 1,200 employees and yet obtain the substance of their testimony was indicated. The Court of Appeals had pointed out that there were well-known methods of doing this. Even the small amount of testimony actually received was not allowed to extend to the subjects pointed out by the Court of Appeals. The Board simply did not receive the evidence which it was directed to receive.

On the point of *considering* the evidence, which it was the principal purpose of the *second hearing* to weigh carefully, the Board and the examiner *recited* that not only did they admit it but they considered it (X 3848, A. 619), but the mere formal lip service recognition of the direction of the Court of Appeals cannot amount to compliance in actual fact where the opinion and order themselves show conclusively that there was no real compliance. Nowhere in the long opinions of the Examiner or the Board does there appear any discussion or thought given to the substance of the testimony of the employees. The fact of their statement of their desires in the matter, the remarkable fact of the overwhelming number so offering to testify, the substance of their testimony, the bearing of such witnesses as testified upon the stand, the question of whether their testimony was coherent or contradictory, whether the reasons given were persuasive or improbable, the consideration of their credibility—all these and many other possible methods of evaluating testimony of the employees are not even mentioned. The Examiner's belief is that any amount of sworn testimony of any number of employees is worthless (A. 484), which ruling the Board approved.

In addition to simply ignoring it in his mental processes directed toward a final result, the Examiner carried out vigorous flanking attacks upon the minute portions admitted, such as ruling that only such testimony as was specifically designated by a formal offer of proof could be presented in the second hearing (VII 2394, VIII 2784, 2785, 2788, 2802, 2808). There was nothing in the decision of the Court of Appeals to warrant limiting of evidence of the employees narrowly within the exact words of a formal offer of proof. He agreed with the Board's attorneys, who still asserted in the second hearing, that this evidence was immaterial (VII, 2083-4, VIII 2590). He ruled that only those witnesses who had actually signed or were specifically named in an offer of proof could be presented at this hearing (VIII 2802). He limited it to a period going back six months before the formation of the DGWU or to about November, 1936 (VIII 2808, VII 2398), but he permitted the Board and the ILGWU to go into matters going back to 1934 and 1935 (151 Fed. (2d), l. c. 874, VIII 2824, 2887, 2890, IX 3027, 3066). He refused to permit any testimony with reference to matters of operation of the plant union occurring subsequent to July, 1939 (VII 2392, 2397, VIII 2597, X 3764). It would seem beyond argument that if the plant union has continued to operate successfully for seven years and down to the present date, which is the fact, that should be some evidence of its being the choice of the employees. Certainly if it had lasted only a few weeks or a few months after the original trouble, the Board would have considered that as very strong evidence that it was not really the choice of the employees. It mentioned in a footnote that the U. S. District Court found that "the respondent's employees acting unanimously had voluntarily formed the DGWU and at all times freely administered and main-

tained it" (X 3842), but merely comments this finding was not binding on the Board.

All of these rulings of the Trial Examiner the Board sustained and approved. The internal evidence of the Board's opinion itself shows that the evidence it was directed to weigh and consider was never weighed and considered at all. If opinions do not disclose the processes of reasoning and the matters weighed and considered in reaching the judicial result, then it is worse than useless to write them for they would become actually deceptive as to what law may be relied upon. However, there is no need to rely on what we have termed internal evidence of the opinion. The Board itself clearly and beyond any question describes its own position (A, p. 619):

> "Since we find the testimony here adduced totally unpersuasive that the employees voluntarily designated the DGWU, we are moreover impelled to adhere to the opinion, derived from our experience in administration of the act, that conclusionary evidence of this nature is *immaterial* to issues such as those presented in this case." (Italics ours.)

The reviewing court on the second appeal found that this testimony "received no different or greater consideration upon the second hearing than it did upon the first, and that it was disregarded in both hearings." (151 F. (2d) l. c. 873.)

This situation is clear and we think cannot be successfully dismissed or explained away. The Board's method of meeting it is to endeavor to distract attention from it by suggesting that the question is whether "the company and the DGWU were not deprived of due process by reason of the Board's limitation of evidence at the hearing on remand to those matters mentioned by the court below as having been erroneously excluded at the first hearing." (Heading of Board's point No. 3, page

85, its brief, and index p. II.) It thus endeavors to assert that the question for argument is whether the Board acted wrongfully in *scrupulously following* the instructions of the Court of Appeals.

The picture presented by the Board for consideration is that of the DGWU and Company's attorneys artfully trying to induce the Board to pay no attention to the Court of Appeals; while the Board's attorneys sturdily defend it in its unflinching determination to follow the Court of Appeals' directions to the letter. The fact that the Board's attorneys found it necessary to present this picture upside down to this Court is a revealing light on the weakness of its position. The Board in clear and emphatic language stated that it would *not* follow the direction of the Court of Appeals on the centrally important issue, nor follow the specific directions of that court as to treating as material the evidence of the employees. Surely the Court of Appeals is an adequate judge of whether its instructions were followed, and its deliberate finding, now here on appeal, is that they were not (151 F. (2d), l. c. 875). As a means of avoiding this issue, the Board devotes many pages to considering whether evidence that employees in other plants, having duties similar to Donnelly instructors, were permitted to belong to other unions, should have been considered by the Board; whether evidence that certain union members were discharged because of their membership was properly admitted; whether evidence comparing the DGWU's contract with the contracts of other labor organizations was properly excluded; whether evidence of alleged violence at other plants was properly excluded, and similar matters. The picture which the Board is trying to paint is that of a large number of minor questions in which the Board earnestly endeavored to follow the complicated instruc-

tions from the Court of Appeals and substantially succeeded in doing so, properly using its own discretion where such instructions were not clear. Of course, this is not a true picture. It would have been impossible for the Court of Appeals to have more clearly stated its rulings that the testimony of the employees as to why they formed their union, and whether they were coerced or not, should be treated as material than was done in its opinion. Lengthy arguments as to whether the Board properly ruled on minor matters of evidence can only serve to obscure the issue of the Board's refusal to follow the substance of the court's instructions. The Court of Appeals on the second appeal has held that the Board did not. We submit that all of the Appellate Court's rulings as to evidence and the prejudice of the examiner and the denial of due process were clearly correct. But that over and above all of these, the Board's refusal to follow the court's direction on the central point of the materiality of the employees' testimony is sufficient, standing by itself, to require the setting aside of the Board's order.

See:

*St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73, 56 S. Ct. 720, 80 L. Ed. 1033.

*Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304-305, 57 S. Ct. 724, 81 L. Ed. 1093;

*Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 393, 58 S. Ct. 344, 82 L. Ed. 319.

*Morgan* v. *United States*, 304 U. S. 1, 14, 15, 58 S. Ct. 773, 999, 82 L. Ed. 1129.

*Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 177, 61 S. Ct. 908, 923, 85 L. Ed. 1251.

*Interstate Commerce Commission* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 88, 102, 30 S. Ct. 651, 656, 54 L. Ed. 946.

(b) **The application of the rule.**

We shall argue elsewhere herein that the treating of this large body of important and material evidence as immaterial and irrelevant makes it impossible for the Board to legitimately reach a conclusion that there was substantial evidence in favor of it, because items of evidence cannot be intelligently considered in a vacuum but only in whatever light or explanation is thrown upon them by the other material relevant evidence in the case. We shall submit later on that the refusal to admit and consider this evidence was denial of due process. But in addition to these facts there is a definite and positive principle of law which requires the vacation of the Board's order and the dismissal of its complaint; that is, "The law of the case." The decision of the Court of Appeals as to what evidence is material and must be considered in order to arrive at a valid decision and order in this case is just as much valid, enforceable and settled law as any other decision of an appellate court in a position of direct authority over a trial court. It has the additional value of being explicitly applied to this case, so that doubts as to differences in facts and whether the cases are "on all fours" do not exist. It is the very reason for the existence of an opinion when a case is sent back for rehearing.

The general statement of this doctrine was well put by the Supreme Court in *Eastern Cherokees* v. *United States*, 225 U. S. 572, l. c. 582, 32 S. Ct. 707, 56 L. Ed. 1212, l. c. 1216:

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit

> Court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded."

As said in *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 144, 84 L. Ed. 656, 663, quoting from an opinion of the late Mr. Chief Justice Hughes:

> "'Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, *whether its proceedings satisfy the pertinent demands of due process*, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action are appropriate questions for judicial decision.'" *Federal Radio Commission* v. *Nelson Bros. Bond and Mortg. Co.*, 289 U. S. 266; 77 L. Ed. 1166, 1174, 53 S. Ct. 627, 89 A. L. R. 406."

Mr. Justice Frankfurter then states:

> *"On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction."* (Italics ours.)

The court said in *Claiborne-Reno Co.* v. *E. I. Dupont DeNemours and Co.*, 77 Fed. (2d) 565, l. c. 566:

> "In the latter case, which is one of the very late cases defining the 'law of the case,' this court in an able opinion by Van Valkenburgh, Circuit Judge, said: 'The phrase "law of the case" has been employed and applied in many decisions of this and

other federal courts. Stated generally, the rule is that, "where evidence is substantially the same on both trials, questions of law determined on writ of error or appeal are 'law of the case,' both for trial and appellate court, on second writ of error or appeal." *Pennsylvania Mining Co.* v. *United Mine Workers of America et al.*, (C. C. A. 8) 28 F. (2d) 851; *Thompson* v. *Maxwell Land-Grant & Railway Co.*, 168 U. S. 451, 18 S. Ct. 121, 42 L. Ed. 539.' This rule has been announced and received adherence in many decisions of this court." (Citing cases.)

As said in 5 C. J. S., Sec. 1964:

"The doctrine of the law of the case has been applied to decisions of a reviewing court in respect of evidence, as in the case of adjudication on review held to establish the law of the case as to burden of proof and presumptions, and admissibility."

The Court of Appeals went to the trouble of explaining that much time would be saved by admitting evidence rather than indulging in long arguments. (See the record.)

See 123 Fed. (2d) 215, at 223:

"The attitude of this court toward the conduct of hearings by a trial examiner we think has been entirely consistent. In *Cupples Co. Manufacturers* v. *National Labor Relations Board*, 8 Cir., 106 F. (2d) 100, 113, we made the suggestion that if a trial examiner would, 'within reasonable limits, permit each of the parties to the proceeding before him to prove his own case, in his own way, by his own counsel,' charges of lack of due process for failure to accord a full and fair hearing could readily be avoided. In *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, *supra*, 113 F. (2d) 698, 702, we ex-

> pressed the opinion that the practice which should be followed by a trial examiner in taking evidence and ruling upon objections to evidence is that which applies to special masters in equity proceedings, and 'that the record should contain all evidence offered by any party in interest, except such as is palpably incompetent * * *.'"

Thus the Court of Appeals took occasion to point out with care and detail to the Board and the examiner just what evidence must be taken and given due consideration in order to lay a basis for any valid finding and order. It even went to the unusual length of pointing out to the examiner and the Board a procedure which would avoid a second failure to afford due process, without injuring the Board's case if evidence was admitted beyond a reasonable cross-section of the employees, or such evidence was admitted which turned out to be immaterial or merely cumulative. The Board confessed its inability to make a case when it refused to take the testimony of employees in any substantial manner. Organizers for the International had many months or years in which to talk with these employees, or any of them, and to check and test their testimony and if it found ground to believe that it could make anything favorable to its case out of the examination or cross-examination of any employees, it would surely have made the attempt. Its total abandoning of this field of testimony means that it can make no progress whatever in it. A second time it confessed its inability to make a case when it flatly contradicted the ruling of the Court of Appeals that the testimony of the employees as to their personal knowledge, motives and volition was material. For if it once admitted that such evidence is material and must be considered, together with other evidence and

as throwing light on other evidence, it immediately appears that it is so overwhelmingly against the Board's position and so bereft of any infinitesimal item in the Board's favor, that it precludes any decision in favor of the Board.

The intermediate opinion of the examiner adopted in substance by the Board (A, 618) mentions in a footnote (3867) that some of respondents' employees discussed reports of "clashes" at other garment factories and expressed a fear that an "organizational campaign" at the respondents' factory might precipitate similar "strikes" and violence. The impression given is that in carrying on a lawful and even dignified campaign certain minor incidents of impropriety might arise which would be no more the fault of one side than the other. This is an outrageously unfair picture of what really went on. The fact is that all the employees and a majority of the five ex-employees who testified for the Board agreed that this nearby violence was a prime cause of organizing the DGWU. But this universally established fact is never referred to by the Board, which suggests, in a sentence, that all the testimony concerning it, *as a cause*, is wrong and that it is really evidence of domination because Mrs. Reed is alleged to have mentioned the undeniable fact of violence and the undeniable right to protection, whereupon the Board infers that every employee in the factory immediately loses his or her ability to tell the truth, or the ability to know what causes him or her to take a position on his or her own affairs, or both, and that *the management* reached a conclusion for them which they all believed (or falsely swore they believed) they reached for themselves. (Except that a majority of five discredited ex-employees, while agreeing that such violence caused the employees in general to organize their own union, yet

asserted that they, personally, were not frightened.) We respectfully refer the court to the various opinions of the federal courts, cited, *supra*, in the injunction cases on this dispute which considered the violence situation and its results in this matter, after hearing many weeks of testimony.

This evidence should have been given due consideration because it established a reason for forming the DGWU. The testimony of *both* sides established it. If the Board is entitled to try to show that the reason for such formation was the domination of the employer surely it is equally admissible for the intervener to show that the reason was an entirely different one. See *Donnelly* v. *NLRB*, 123 Fed. (2d) 215, l. c. 221:

> "The petitioner Donnelly Garment Workers' Union, in the hearing before the examiner, attempted to prove that it was an independent labor organization of all the employees of the Donnelly Garment Company; that the union was organized by and for such employees and was under their exclusive domination and control, and that it at all times had been free from employer domination, interference and support; that the employees believed and had reasonable grounds to believe that the International was resorting to force, violence and threats to compel other employees in other garment plants in Kansas City to join the International and to force their employers to compel them to join it, and was about to attempt to force the employees of the Donnelly Company by the same methods to join the International and that one of the motives which prompted them to form the Donnelly Garment Workers' Union was self-protection."
>
> . . . . . .
>
> "It was not shown that any of the employees of the Donnelly Company whose testimony was offered

was under any disqualifying disability. There was no presumption that these employees would commit perjury, and, even if the trial examiner believed that they would perjure themselves, that would not have affected the admissibility of their evidence."

"Evidence is relevant if it tends either to prove or to disprove any issue in a case. We do not say that the trial examiner was required to take the same testimony from 1200 witnesses. There were available to him well-known expedients for limiting the number of witnesses where their testimony was cumulative."

See:

*Smyth* v. *Klauder*, 58 Fed. (2d) 109 at 110: "It cannot be varied or examined by the trial court except for the purpose of execution"; certiorari denied, 284 U. S. 681, 76 L. Ed. 575.

*Litchfield* v. *Dubuque*, 74 U. S. 270, 19 L. Ed. 150.

*Goldwyn Pictures* v. *Howells Sales*, 287 Fed. 100, certiorari denied, 262 U. S. 755, 67 L. Ed. 1217.

*In Re Sanford Fork and Tool Co.*, 160 U. S. 247, 255, 40 L. Ed. 414.

*Federal Trade Commission* v. *Standard Education Society*, 97 Fed. (2d) 513, certiorari denied, 305 U. S. 642, 83 L. Ed. 414.

*Henning* v. *Eldridge*, 33 N. E. 754, l. c. 755.

*Tribune Co.* v. *Emery Motor Livery Co.*, 170 N. E. 772, l. c. 774.

As stated in 5 C. J. S., par. 1964, p. 1501:

"The rule is especially applicable where the appellate court has remanded the cause with specific directions as to the steps to be taken by the lower court, or on further proceedings after answer to certified questions; and such rule holds good regardless of

whether the decision of the appellate court is right or wrong, it being said that it is only where the decision is deemed erroneous that the doctrine of 'the law of the case' becomes at all important."

**(c) The Indiana and Michigan Electric case.**

The case of *NLRB* v. *Indiana and Michigan Electric Company*, 318 U. S. 9, 87 L. Ed. 579, was cited to the Circuit Court of Appeals, and was referred to by that court in its last decision in this case (*Donnelly* v. *NLRB; DGWU, Intervener*, 151 Fed. (2d) 854 at 873). The Board in its brief to this court devotes several pages to consideration of that case (Bd. Bf., pp. 99-192). We believe that applicable to the case at bar in two distinct ways:

First, on the law of the case. In the Indiana and Michigan case, Marks and Freeman, two union members, both of whom had been witnesses against the company, and three others, had engaged in dynamiting the company's transmission poles shortly before the hearing. The company proposed to produce evidence of this fact for the purpose of discrediting the testimony of Marks and Freeman. The Circuit Court of Appeals held that the evidence was material (87 L. Ed., l. c. 585), and directed the Labor Board to take and so consider it. The Board refused to do so and on certiorari granted by this court, gave its reasons. It argued that the Court of Appeals was wrong in asserting that a remand might result in the impeachment of Guy, Marks and Freeman, for, say the Board, their "testimony was either cumulative (being corroborated by other witnesses) or entirely immaterial and not relied on by the Board; and that there is other substantial evidence in the record to support the Board's decision" (l. c. 585). This court held that the Board must comply with the directions of the Appellate Court as to

evidence, pointing out that even if the Supreme Court did not agree with the Court of Appeals, still the Board would have to follow the direction of the Court of Appeals as to the taking and considering of evidence unless such directions were so far afield as to amount to an abuse of discretion (see page 585):

> "Thus, in order to decide this case in favor of the Board we would have to hold not merely that the evidence of dynamiting would be a matter of indifference in our own view of the case, but that the court designated by statute to exercise discretion in the matter and which desired to know the facts about it before passing on the sufficiency of the evidence and the impartiality of the examiner and which thought the finder of the facts should hear and consider such evidence, must not only have been in error but must also have abused its judicial discretion."

And again at page 591:

> "But the court is given discretion to see that before a party's rights are finally foreclosed, his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings is heard and weighed."

Although the Board discusses the Indiana and Michigan case at length, it does not refer to this important point.

To the same effect is *Southport Petroleum Co.* v. *NLRB*, 315 U. S. 100, 86 L. Ed. 718 at 723. This court, therefore, confirmed the power and duty of the Court of Appeals to direct the Board as to what is material evidence in the case appealed to it and to direct the Board not only to take such evidence, but to treat it as material and to place it in the scales on one side to be weighed

against conflicting evidence, unless the Court of Appeals was so far wrong in its judgment as to go beyond the discretion conferred upon it as the supervising authority over the Board. We submit that this ruling applies in the case at bar.

Second, on the exclusion of evidence as to violence. As a distinct and separate reason for the consideration of such evidence refused by the Board (I 334q-334v; II 553, 614, 626-627, 700-703, 706, 718y-718bb; III 742d, 758 [offer of proof 1-0000]; VI 1752-1753 [offer of proof refused], 2046-2047) in this case this court in the Indiana and Michigan case pointed out the following situation (87 L. Ed., l. c. 587):

> "We think this course of violence and lawlessness concurrent with the Board proceedings, apparently instigated by those who stand to gain from the Board's decisions, participated in by parties and witnesses, may not be said to lack possible materiality on other issues of the case. The question goes to the fairness of giving absolute finality to the Board's findings of fact where there has been a refusal to hear and incorporate in the record such evidence as may be produced of such a conspiracy."

and again at 591:

> "The remedies of the law are substitutes for violence, not supplements to violence, and it is proper that courts and administrative bodies so employ their discretion as to dispel any belief that use of dynamite will advance legal remedies."

and at page 589:

> "It is unrealistic to say that this union was granted nothing by the Board's order or that no relief has been given to this particular union."

This court also held, at page 587, that:

> "The Board might properly withhold or dismiss its own complaint if it should appear that the charge is so related to a course of violence and destruction, carried on for the purpose of coercing an employer to help herd its employees into the complaining union, as to constitute an abuse of the Board's process." (Also quoted at 151 F. (2d), l. c. 873.)

When the party to a dispute who is asking enforcement or investigation of its position by the Labor Board is definitely associated with unlawful violence, in that identical dispute, it is the duty of the Board and the court to scrutinize the facts in order that its aid shall not be given to violence and lawlessness. Of course, what the complaining witness is guilty of, if anything, has nothing to do with whether the intervenor is or is not a valid union. But this is a different point. To say that the court, by supporting the organizational plans against a certain factory, would not be lending aid and support to lawlessness of a group who employ lawlessness in those very organizational plans, is, as this court has said, simply not realistic. It gives them the great assistance of a department of government ruling against their opponents.

The violence of the International is established. Three courts have so held: See 21 Fed. Supp. 807, l. c. 811, 819, and the conclusion of even the dissenting judge therein at page 831 is to the effect that insofar as misconduct of the International goes an overwhelming case in support of injunction has been made; 151 Fed. (2d) 854 at 873, where the court said "that the charges of misconduct made by the company and the plants union against the International are not without substance is shown by the record"; and 154 Fed. (2d) 45, in which the Court of Appeals denied a permanent injunction because of lack of

evidence of *present* threat and of lack of evidence that the *present* police force would not or could not control similar outbreaks at the time of the trial some eight years after clearly established violence when the suit was originally filed, and based its finding solely on jurisdictional issues "since we conclude that the trial court's findings against the appellants in this case *on issues necessary to its power and jurisdiction* to enjoin the appellees are not clearly erroneous, the decree appealed from is affirmed." (Italics ours.)

But the Board argues that the violence used by the International in this case was not dynamiting as in the Indiana and Michigan case; that it was not shown to have been perpetrated by witnesses in this case, but was actively indulged in against employees of nearby companies and not against Donnelly employees.

This is a distinction without a difference.

The reasoning of the Indiana and Michigan case is that any substantial violence (not limited to dynamiting or to witnesses on the stand) which is perpetrated *as a part of a campaign* to force unionization of a plant or its employees, will not be aided by an arm of the government entertaining a petition calculated to assist the perpetrators in the organizing of that plant. It quotes the Board's finding that "it may be true, as the (company) contends, that many of them (the employees) feared the alleged threats of the ILGWU," but finds that instead of permitting employees to decide for themselves what attitudes they would adopt, the company seized upon such fears to build up and strengthen a militant employee opposition toward that labor organization. The only evidence or testimony it cites in support of this wholly unjustified finding is the opinion of the Board itself. (X 3868-3869).

That the violence in the present case was part of a plan to organize this plant is clear.

In November, 1936, International's president (V 1549) and General Executive Board (X 3677) announced an organizational drive in which their Kansas City office would concentrate on the Donnelly plant (V 1549). Newspaper advertisements stated that the smaller Kansas City plants were being organized in order to get ready for Donnelly's (IV 1336g), and during the violence around those smaller plants the pickets made statements to the same effect (IV 1336vvv). Miss Tobin, manager of International's local organizations in Kansas City (IV 1318), while a beating was being administered to an elderly woman in front of other Kansas City plants, stated that this was just a sample of what they were going to do at Donnelly's (II 718z). Mr. Dubinsky testified that the full page advertisement of the International addressed to the Donnelly Company had and has his approval. That advertisement stated that the International "cannot, should not and will not permit one individual employer to segregate itself," and that

> "It still lies within your choice to avoid a conflict which may prove as costly as it appears futile at this stage to all sides involved in it. Your readiness to meet us in this endeavor in a spirit of industrial statesmanship rather than in that guerrilla warfare will be applauded by every constructive factor in the dress industry in general the country over" (V 1534-4.)

Justice, the organ of the International, announced that the union "is now concentrating on organizing the few remaining small shops while preparing to organize a drive to organize the Donnelly Garment Company" (V

1519), and that "David Dubinsky, president of the ILGWU, on Saturday, March 6, officially launched a movement to organize the Donnelly Garment Company" (V 1521). Mr. Dubinsky gave an interview to the Associated Press in which he stated that the St. Louis office of the International would have sufficed for Missouri except that the union "wants to give Jim Reed a break" (V 1549). Numerous other exhibits demonstrating that the main object of violence in Kansas City was the unionization of the Donnelly employees appear in the record (V 1417 to 1583 and XI). No efforts to negotiate were ever addressed by the international to the employees, but only to the management. The Regional Director for the International stated that the same actions would be taken against Donnelly employees, if the court did not issue an injunction (V 1510-11). It may be that this evidence is not sufficient to enjoin the officers and all members of the board of the International under the narrow provisions of the Norris-LaGuardia Act as to personal authorization, present threat, inability of police force, etc., but it surely shows that the campaign of the International in Kansas City was directed toward the forcible organization of the Donnelly employees.

If the violence of the International directed toward the organization of these employees by for is aided by the Boards dissolving of its opposition (the DGWU), then the violence has been successful and an appropriate and paying procedure. A labor group may use unlawful violence and the aid of the Labor Board at the same time and in the same campaign.

**(d) The effect of the Administrative Procedure Act.**

The Court of Appeals had ample authority under the law to set aside the order of the Labor Board in this case. Such authority springs not only from the express provisions of the National Labor Relations Act (29 U. S. C. 160, e, f), but also from fundamental principles of common law, which are fully discussed in the opinion of that court and are the subject of a substantial part of this brief. Since that opinion was rendered, the power and duty of appellate courts to set aside orders and findings reached without due process—as is the situation here—has been substantially extended and clarified by the Administrative Procedure Act (Chapter 324, Laws of 79th Congress, Second Session, Public Law 404, approved on June 11, 1946). The parts of that Act herein relied on became effective on September 11, 1946. Its provisions as to the review by the courts of orders of administrative agencies read as follows:

> "(e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by

the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

It is to be noted that the reviewing court shall decide all relevant questions of law, which certainly include the admissibility of competent and material evidence and whether evidence is material, and that such appellate court is to interpret constitutional and statutory provisions, which includes due process. The appellate court is directed to "hold unlawful and set aside agency action" which does not measure up to the requirements of due process. It is submitted that "set aside" as herein used means "set aside" and nothing more. It does not direct further hearings nor substitute orders, but leaves the agency with its petition denied. This course of action is especially appropriate where the agency has flatly refused to follow the instructions given to it in the same case by the court with supervisory powers and has stated its decision not to proceed in accordance therewith and, by implication, admitted that it could not possibly make a case by proceeding in accord with such instructions (that is, in this case, the taking and considering as material evidence the testimony of the employees, either in total or in any reasonable cross-section). The six grounds listed in the quoted paragraph and the general requirement as to prejudicial error may be urged to have been recognized parts of the law before this Act was passed. Indeed, the Court of Appeals opinion relies on some of them. Yet the statute will not be construed to be meaningless where there is a reasonable interpretation. Surely one purpose, if not the predominating and sole purpose, of the statute

was to make clear, especially because of some court decisions which exhibited a contrary or at least a doubtful idea, that these constitutional and fundamental requirements are to be fully and definitely enforced in dealing with findings and orders of administrative agencies, including the Labor Board.

So considered—and we are at a loss to see how it could be considered in any other manner—the Act declares a public policy of enforcing these principles, through the supervision of appellate courts, without any relaxation in favor of administrative bureaus, and removes any possible shadow of doubt that the order made by the Court of Appeals was properly entered. The debates on the bill before Congress show that it was passed with this definite and express purpose in the minds of the legislators. (See quotations in the appendix to this brief.)

The International relies heavily in its brief in the last part of point one (International's brief, page .....) on inference as justifiable support for the decisions of administrative agencies. It quotes language indicating that "inferences to be drawn are for the Board and not the courts" and that inferences drawn by the Board will not be disturbed by the court even though contrary inferences could have been drawn. We submit that these cases do not hold that inferences drawn by the Board must or should be sustained when to do so requires that positive, direct and material testimony to the contrary from witnesses who are not impeached or discredited must be completely disregarded in order to sustain such inferences. However, in any case we think the Federal Administrative Procedure Act has declared and clarified the policy of Congress as to the direction and supervision of administrative agencies so that no such contention as that of the Board and the International can be sustained. The Inter-

national's brief argues that Congress could grant such scope of review of administrative board findings to the courts as we claim, but that it has not done so. The Federal Administrative Procedure Act has made the grant of such scope of review clear.

III.

**The findings of fact by the Board are not supported by substantial evidence.**

**(a) The findings are based on inference and suspicion.**

The Board has devoted the major portion of its brief and all of Point I of its Argument to a defense of its findings. Elsewhere herein we have quoted from cases pointing out that neither a trial court nor an administrative agency is free to disregard direct testimony, by relying merely on suspicion. It would seem logical that if the law regards the unimpeached positive testimony of an uncontradicted witness who knows the facts as prevailing over mere inference or conclusions drawn from secondary facts, then the similar testimony of some 1,200 witnesses without exception would require a veritable mountain of inferences and testimony about secondary facts from which conclusions may be drawn but which do not in themselves determine the issue, in order to have any hope of raising some shadow of doubt. The Board apparently agrees with this for it has used in its brief an appalling number of citations, perhaps with the idea that it will produce the impression of a mountain of evidence, even though it be a combination of inference and secondary facts, and even though a large part of it is outweighed by a much larger body of evidence flatly to the contrary. We ask the court's consideration of the nature of these citations, which will demonstrate that they are far

from being a mountain of evidence and far from being "substantial."

An examination of the Board's and the International's citations show that they fall into five classes:

(1) The citation of its own findings as evidence in support of their correctness. The Board cites its own findings more than 225 times, often with no supporting evidence (36 times), and sometimes with preliminary statements that "as the Board found," etc., and sometimes without such explanation. The International also relies heavily on the Board's findings as evidence to support their correctness (X 3837-3898 is the Board's findings).

(2) Citations to facts which are noncontroversial and throw no light on the questions involved, such as the dates on which actions were filed, the names of witnesses who testified, etc.

(3) Citations of testimony of employees to the effect that they never considered Rose Todd or Hobart Atherton as representing the employer or having any supervisory powers or speeches of employees or actions in meetings to the effect that they desired their own union, etc., as inferentially proving the opposite of what they say.

(4) Citations to the NRA hearings held before the National Labor Relations Act was passed.

(5) References to the testimony of the seven ex-employees in two hearings of about six weeks each. These ex-employees recite personal grievances against their co-employees or against the Company, readily admitting bias or even hatred, and that their memories as to dates, exact hours and statements occurring five years before the second hearing were refreshed only about a week before that hearing by representatives of the Board or the

International. We have commented elsewhere in detail and with repetition on the testimony of these witnesses because it is actually the Board's case and because of the peculiar fact that their testimony also recognized that as to the fact for the ascertainment for which the case was remanded for rehearing, they clearly support the position of the DGWU. In other words, they agree (with one exception) that when they previously stated that the plant union was the free and voluntary choice of the employees, they were telling the truth. They agree that the belief that the formation of the plant union would substantially aid the employees in protecting themselves against the violence being perpetrated by the International against employees of nearby smaller plants and threatened against these employees, was held by the employees generally. Their contrary evidence five years later is that they personally did not fear such violences; that they signed everything they were asked to sign although nobody in any way forced them to do so; that they now feel the employees or they themselves did not exercise their best judgment that they felt that is they did not join the plant union they might not have a job since if the plant union secured a closed shop they would have to belong to it in order to work, and that (in the case of one Board witness) she joined the International on the same day on which she made a statement in favor of or joined the DGWU, and for a time secretly reported such facts as she could gather about the DGWU to the International. In spite of the hundreds of citations, this is the Board's case.

The Board states on page 10 of its brief, "The Board thereupon called several of the 1,200 employees who testified contrary to the offer of proof," and cites 22 references covering 81 pages in the record. The fact is that no employee ever testified contrary to the offer of proof.

This testimony was offered by the Board as evidence in rebuttal of the evidence of the Company and the intervener (IX 3277), but is now being cited by the Board as being in contradiction to evidence which the intervener and the Company were not allowed to introduce. The offer of proof which the Board claims this evidence refutes was refused by the trial examiner (III 743).

The first four citations used by the Board in support of its statement above cover four pages of the record and refer to lists of names on the Company's offer of proof, Exhibit 1-00000.

The next citation, covering nine pages in the record, refers to testimony of Dorsey, an ex-employee, and which contains no contradiction to the offer of proof and some arguments by the trial examiner and the attorneys. The balance of the references are to more testimony by Dorsey and testimony of Skeens, Copenhaver, Weilert and Stevens, all ex-employees of the Company, who are discussed hereinafter. The offer of proof (III 743-763) includes statements of many details as to hours of meetings, Loyalty League, no pressure to attend meetings, etc. If the Board means that five ex-employees testified contrary to some unspecified detail or details included in this offer of proof, we think it should so state. Their explicit or tacit admission that the affidavit (VI 1677 to 1749) and the substance of this offer of proof are true—that is, the choice of the DGWU by the overwhelming majority of the employees—is clear.

At the start of Part One of its Argument to this court, the Board attempts to establish that its findings as to the supervisory or management status of various employees is based on "strong and compelling evidence." To prove this point it begins by considering various subsidiary matters, such as: "1: Instructors and thread girls" (p.

23). The trial examiner in the first hearing rejected the proffered evidence that the locals of the ILGWU, at least in this section of the country, admitted to membership employees from other garment factories who did comparable work and had similar titles to the instructors and thread girls at the Donnelly plant. The court below was of the opinion (151 F. (2d), l. c. 874-5) that this offer of proof should not have been rejected. The Board in its brief (pp. 20-21) still contends that such evidence "was only remotely relevant or wholly immaterial to any issue in this case." The Board found "that the instructors and thread girls are supervisory employees and that they act for the management in the factory" (p. 27, Bd. Br., X 3854), and an analysis of its citations to the record shows that it has based its finding on scant and unreliable evidence. Its 118 citations under this specific point fall into the general classifications of: to its own findings, 23; to uncontradicted matter, 16 (its first 14 citations fall into this category); to testimony of discredited witnesses, 31 (that is, citations falling between IX 3426 and X 3708); to "NRA and JMC" testimony, 20, most of which testimony was given in 1935, and was as to acts prior to the National Labor Relations Act (citations to Record III 1032 to IV 1300). We find that of the testimony falling outside these general classifications, the Board has relied heavily upon that of Jessie Mudd, a thread girl, for it cites her testimony ten different times: 2963-67, 2959, 2963-64, 2959-60, 2956-57, 2949-55, 2957-60, 2963-65, 2967, 2962. The Board, however, found it necessary to omit her testimony after its statement that "the thread girls assume charge whenever the instructors are absent" (Br., p. 25), for Jessie Mudd, a thread girl herself, testifies to the direct opposite (VIII 2960). It relies instead upon statements by two ex-employees and upon testimony in the

1935 NRA hearing, and of one Garrett, who was not a thread girl and whose testimony was not that the thread girls were in charge, but was that when the instructors were "absent for a very short period" then "the thread girl *handed us* work" (IX 3193). She did not consider an instructor to be a supervisor (3146). Does the Board infer from this statement that handing work to operators made thread girls instructors or that this action identifies such employees as holding positions of authority?

When the Board finds that the instructors had the power to "discipline girls," it cites its own findings twice and shows that they are supported by six citations to the 1935 NRA hearing as to conditions *before* the NLRA was enacted and two years before the DGWU was organized, and by testimony of Skeens (a disgruntled ex-employee), whose statement on the cited page is, "We disciplined in a way. We had to see that they didn't talk too much or—" (IX 3464).

The Board states, page 27 in its brief, that the instructors regard themselves as "supervisors" and were so regarded by the employees. The only testimony cited to support this is that of the four disgruntled ex-employees, and of one other, whose testimony is that she considered the instructor at two other plants, Liberty Garment Co. and Brooks, as supervisors (VIII 2604), but at no place does she state that the Donnelly instructors were considered by her as supervisors. There is much testimony to the contrary.

The Board to bolster its finding that instructors are supervisors selects a quotation from the testimony of Mrs. Hyde (II 423) but rejects her testimony on succeeding pages (II 425) that Mr. Baty and Mrs. Hyde were the only persons that have anything to do with hiring and discharging employees and on page 426 that instructors

do not have "any authority to order or discipline or fire people that work in their sections."

The Board concludes its argument on this point by the statement that the functions of the instructors and thread girls "* * * fall entirely within the accepted definition of foreman, whose duties often include *teaching* or *instructing* their subordinates" (Bd. Bf. 27-28). The fact that the instructors' duties were "teaching and instructing," is admitted, and evidently that is actually what the Board found that the Donnelly instructors did. Does the Board mean that no further attributes of a supervisor are necessary to make an employee the representative of management? The Board found that the instructor and thread girls were the management's representatives. From an analysis of the Board's citations to the record, we shall urge that even by basing its findings on the testimony as to acts in 1935, and on statements by six seriously prejudiced ex-employees, and by picking out of the testimony of other witnesses only those pieces of testimony that it wishes and disregarding testimony of the same witness on other points, still it has not shown that this finding is based on more than a mere scintilla of evidence. Certainly it is contrary to the understanding of the administrative officers and fully 98% of the employees (III, 743-763 at 759, 761). The instructors or thread girls never gave any instructions as to going to meetings nor had any authority to do so and never herded their fellow employees to meetings (X, 3720; 3725, 3714, 3734, 3735, 3738, 3739, 3743, 3762, 3765, 3769, 3778 3774, 3777, 3779).

The Board's brief at page 23 states that "the Board was certainly entitled to base its decision on the role actually played by the supervisory employees rather than upon their titles" and cites the case of *Cupples Company*

v. *NLRB*, 106 Fed. (2d) 100, 114, as explaining this statement. In the Cupples case the court held that the title was unimportant and even though she (Miss Weitzel) was known as a "forelady" or "supervisor" there was nothing in the evidence to show that as far as her activities relating to the union were concerned she represented the Company. The assumption of the employees or her own representations were unimportant. The cease and desist order of the Board was set aside and the order to reinstate employees was vacated. See page 114:

> "The Board contends that, since Irene Weitzel was shown to have been regarded and referred to as a 'forelady' or 'supervisor,' a finding that her interference and domination in connection with the formation of the Association was the interference and domination of the employer was justified. It seems to us that the question of her title is unimportant and that the vital question is whether, under the evidence, she was or could reasonably be found to be the representative of the Company in connection with her activities relating to the two labor unions."

Quoting from page 115:

> "There is no evidence in the record that Miss Weitzel was ever held out by the Company as a person having authority to advise others with respect to joining or not joining labor organizations. What her fellow-employees of the match department may have assumed her authority to be and what she may have represented it to be, we regard as unimportant in so far as the Company is concerned, since there is no proof that her acts which are complained of were done at its direction or with its knowledge or consent. It would be strange if the efforts of the employees of the petitioner to organize and to select

representatives for collective bargaining could be utterly frustrated and destroyed through attributing the acts of one of their number—who, so far as the record shows, was eligible to membership in both the Association and the Matchworkers' Union—to the employer, without any showing that the employer had ever authorized, consented to, or was aware of such acts."

To show that it is empowered to hold the Company responsible for the acts of its supervisory employees, the Board has cited three cases decided by this court.

In the *H. J. Heinz Co.* v. *NLRB* case, 311 U. S. 514, the Company did not seriously dispute or challenge, as we have here, the finding by the Board that the employees who solicited on behalf of the union, were supervisors and were representatives of the management. The Company's contention was that, not knowing of their acts, it was not chargeable with them.

In the International Machinists case (311 U. S. 72) it was also held that the employer had "assisted" the International to enroll a majority of its employees into that union as against the UAW, even though the Company did not expressly authorize those whom the Board found to be management representatives, to assist in this effort. The court also noted that these same employees had been closely connected with the previous plant union. Here the old Company union had been dissolved, after which there was an electioneering campaign between the International and the UAW; and an election. The defeated UAW charged that due to the Company's unfair labor practices, the International was not the uncoerced choice of the majority of the toolroom employees. In that case the Board did not have before it the direct testimony of every

employee who was permitted to testify on the point, and the offer of proof of all the others, that the union to which they belonged was their free will choice, as in the case at bar.

The Link-Belt Co. case, 311 U. S. 584, again deals, as have the other two, with dissolved plant unions and the origin of a new union. The leader of the old Independent union testified that he was dismayed when the Wagner Act was declared by this court to be constitutional. Certainly that is the direct opposite of the case at bar, where the Donnelly employees testify that the announcement that the NLRA was constitutional was hailed with joy, because it preserved to them the right to organize their own union, and has fought throughout the years to maintain that right. In that case it was shown that the foreman had signed for illiterate employees and it was not denied that the night boss also solicited for the Independent. In the case at bar, at an open meeting of all employees the organization of the union was explained to them, and each was given the opportunity to take all the time necessary to give due consideration to the matter before becoming a member of the union. There were no illiterates. Also here it is not the fact that anyone with supervisory powers solicited for the DGWU.

The Board's next subtitle is "2. Rose Todd." The Board's finding is "* * * that Rose Todd occupied a close and confidential position with the respondent and further finds that in such postion she was acting for and on behalf of the respondent" (X 3858). However, in its brief the Board has narrowed down this finding and has restricted it to "her labor relations activities." The full quotation is "It was well within the Board's competence to find, as it did, that in her labor relations activities Todd 'was acting for and on behalf of' the Company

(X 3858)" (Bd's Br., p. 31). Analyzing the citations used by the Board in its brief to support this finding, we discover that it has used 12 citations to its findings (4 without supporting evidence); 9 are used for trivial or uncontradicted statements, such as "Upon returning to the Company's employ she worked for a while as a thread girl"; and 6 to that of ex-employees shown elsewhere to be entirely discredited witnesses; and further that it has relied chiefly upon Rose Todd's own testimony, which it cites 12 times. Nevertheless it rejects all of her testimony as to the chief question in this case, that of the free will choice of the Donnelly employees. The Board also used 10 or more references to exhibits, from which it proceeds to draw inferences and assumptions, and then state them as facts. An illustration of this is at the close of the first paragraph at the top of page 31 of its brief. Here there are 7 references to payroll records in support of—what should be labeled the Board's findings—that the Company thereby recognized "that her activities in connection with the DGWU were performed as a part of her duties for the Company."

The Board again states that "Todd apparently had no well-defined duties * * *." However, in its Findings of Fact, it describes in detail her duties (X 3855-3856).

We have chosen two illustrations of the attempt by the Board to convey to this court the impression that Todd was tied up with the management of the Donnelly Company, by stating as facts, incidents which, trivial in themselves, sound when put into the Board's words, as though they were important facts. First, it is stated that her duties "* * * required her frequently * * * to *interview* the instructors and thread girls," and cites only the testimony Todd herself at I 24-24a, and 29, to support the finding at X 3856. This is an exaggerated premise to

draw from Todd's answers to the questions put to her by the Board's attorney:

"Q. Is it not true, Miss Witness, that in your duties at the plant, at present, that you do go around and talk to practically all of the instructors almost daily? A. Yes, sir.

Q. And you talk to almost all of these girls in addition? A. Yes.

Q. Do you know (do) any employee at the plant whose duties carry them to more places in the plant daily than you? A. Well, that is rather a broad question. Mr. Baty would certainly be through the plant every day, but, of course, you take your basket boys, anybody that is supplying work to that plant, the size it is, would have to be through it. We have errand girls from various floors, have pick-up boys. I could name any number of people that go through that plant all day long. We have a pick-up system that two boys, that is all they do all day long, is go through the plant.

Q. They are messenger boys? A. Take our thread girls there, that work necessarily takes them, going from one department to the other, notion department and pressing department" (I 29).

The connotation of "interviewing" is entirely apart from the "talking" which she indicates, in the above testimony, to have had with the employees of that plant.

Second: is the statement that "* * * she often lunched in the Company's private dining room which was reserved for executives and supervisory personnel" (Bd.'s Br., p. 30). In the first place the "private dining room" referred to, according to May Stevens' whose testimony is the only one cited in support of this fictitious statement, is a "little room built at the end of the cafeteria" and she states "the instructors ate in that little room."

Farther on (X 3675) when Mrs. Stevens is asked "* * * did you ever see Rose Todd eating lunch?" and the further question "Where did she eat?" she testifies that "She (Todd) ate in that little room and at various places up on the floor of the cafeteria."

The record is replete with testimony of the employees themselves, plus the Offer of Proof which was rejected, that Rose Todd spoke for, and was the representative of, the employees; and that it was upon their behalf she worked for the organization of the DGWU and in its interests after its organization. All of this testimony the Board ignored, although it found it necessary to base its findings to the contrary, upon mere shreds of testimony and unusual inferences therefrom. We shall maintain that it is not within the Board's "competence" or authority to base its findings upon such inferences, when there is in the record the positive testimony of all who know the facts that Rose Todd was acting for and on behalf of the *employees.*

In "spot checking" the Board's citations of evidence supporting its findings, we next examine the Board's statements on pages 34 to 37 of its brief, regarding the Company's opposition to the 1934 campaign of the ILGWU. It will be remembered that the DGWU was organized in 1937, three years after the 1934 campaign, and that the original complaint was filed with the NLRB in 1939, or five years after the 1934 campaign. In this portion of its brief, the Board uses 26 citations to its findings and 92 references to the testimony taken in the "NRA" and "JMC" hearings; plus three citations of the testimony of discredited witnesses upon the point that Mrs. Gray was "* * * manager of the Company's retail outlet store, * * *."

A casual reading of this point gives the impression that the Board has testimony to support a great many of its findings, nevertheless an analysis of its citations discloses that it refers sixteen times to one page of its findings, i. e. X 3860.

Solely upon the testimony which the trial examiner did not himself hear, it being made available to him entirely through transcript, the Board states on page 37 of its brief, that he found "on the testimony of some of the employees, that as a result of the sequence of events above related, employees became afraid to join, admit their membership in, or discuss the ILGWU." The direct testimony which the trial examiner did hear of all whom he permitted to testify on the point, plus the rejected Offer of Proof, was that whatever fear which was engendered in the employees was the result of ILGWU'S activities; and definitely that the employees were in fear of the electioneering campaign of violence which the International used in 1937 against workers at other garment factories in Kansas City, and which it said was to be used as a spearhead against the Donnelly employees. The employees' testimony was just as convincing also that no pressure was ever exerted upon them by the Company or anyone whom they considered to be the representative of the Company. (Offer of Proof III 756, 757.)

We think the Board uses an incorrect term in discussion of the "Loyalty Petition." On pp. 41-43 of its brief it has referred ten times to a "pledge" of the employees. At every place where it is mentioned in the record, not only in the citations shown by the Board, but at all other places, it is called, what in fact it is, a Loyalty Petition, and not a pledge. There is one exception to this general statement and that is in the trial examiner's findings, where it is referred to by him interchangeably as a peti-

tion or a pledge. There is nothing in the Loyalty Petition, which is quoted in full on page 41 of the Board's brief, that even by indirection or by inference could be construed to be a "pledge." An expression of satisfaction and a refusal "to acknowledge any labor union organization" in the present tense involves no pledge whatever.

The Board argues in point D-2 on page 58 and 59 of their brief that there was no representative of the DGWU on the piecework committee. The truth is that the president of the DGWU had to approve any piece rate before it could be put into effect (VII, 2399); that there was adequate machinery within the union to protest and adjust any unsatisfactory rates (I, 113, 114; II, 716, 718g); and that many such adjustments were handled by the DGWU (VII, 2159-61; I, 113-114; II, 716, 718g); that some adjustments were made over the heads of this committee (VII, 2158).

Donnelly Garment Workers' Union has had a practice from its origin of reimbursing its members for time spent on union business which might cause them to lose pay, and the Company has deducted for time lost because of such activities (Vol. X 3764-6, 3767, 3770, 3772, 3774, 3778-9).

The examiner for the Board found that there was no meeting about the end of March or the first of April (X 3873, footnote) in the face of the fact that 18 witnesses testified positively that a meeting was held at that time and recited what was done at it, while, on the other hand, one Board witness testified that she did not know of any such meeting, "There never was no such meeting to my knowledge" (I 332). At the second hearing one Board witness did not remember whether the employees raised a fund for the attorney prior to April 27th (IX 3316); two testified they never heard of the attorney before

April 27th (IX-3432; X 3552), and one said she paid 50 cents in May (X 3671). The Board argues that this is a reasonable weighing of the evidence on the ground that it would be inconsistent to hold such a meeting because money had already been borrowed to pay the attorney a retainer (X 3873, footnote). But the money borrowed from the bank was with the specific plan of repayment by collections from the employees and this was in fact done, which surely makes such action highly consistent instead of inconsistent. The Board also urges that it is unlikely that the meeting occurred because there is testimony that Rose Todd explained about the committee at that meeting, whereas the minutes of April 27th show that she explained about the same thing on April 27th and that there are no written minutes on the meeting at the end of March or the first part of April. In other words, the Board is perfectly ready to disbelieve any number of witnesses who have in no way been impeached on the strength of one witness who says she does not know whether the fact occurred or not and on inferences which are, at least, as consistent with the testimony as inconsistent with it. This method of dealing with the evidence is characteristic throughout the findings.

The International, on page ..... of its brief, twice resorts to a remarkable use of inferences. The first is its statement that the court's opinion shows that "beyond all cavil" the "findings of the trial examiner are supported by substantial evidence (XIII 8-25), whereas these comments the court had denominated as "the facts which the Board *contends* are established by the evidence." The court had just as conscientiously set out the facts which the DGWU and the Company contend are established by the evidence. The International evidently infers that the mere inclusion in detail of the Board's findings in the

court's comment is sufficient to show that they "are supported by substantial evidence," and further infers that that court found that the contentions of the DGWU and the Company were not supported. The more logical conclusion is that the court included these two statements to support its own mandate which denied enforcement of the Board's order "* * * for want of due process in the proceeding upon which the order is based" (l. c. 875). Certainly it is fallacious to infer that the detailed recital of the findings and contentions of the Board shows that the court (in its opinion) found "that the findings of the trial examiner are supported by substantial evidence."

The International follows the above inference with a still stronger one after quoting the court's comments on this picture drawn by the International it assumes that this "* * * comes very nearly holding that the findings of the examiner in this case were supported by substantial evidence * * *." Evidently, the Internatoinal believes that if the Board in its competency can look behind what the employees say and decide that the employees are dominated, although all of them say that they were not, then it, the International, can look behind the two pictures which the court draws, one on behalf of the employees and the other on behalf of the Board and the International, and, by inferring that the court disregarded the former, arrive at the statement that the court "very nearly held that there was substantial evidence to support the findings."

In the first hearing the Board opened up its case by putting the chairman of the executive committee of the DGWU on the witness stand, and without anything which could be called direct examination preceding, cross-examined her for five days. The examiner took a vigorous part. This was followed by many days of examination of

the minutes of the DGWU, of its bank account and of an official of the Kansas City Chair Company who testified that chairs for union meetings and for the Donnelly Company had been carried under the same heading for some time. He also testified that the chair company had no system of bookkeeping worthy of the name until about August, 1938, and that the accounts might well have been carried as they were as a matter of the chair company's convenience. They all went to the same building and to an organization the first name of which was "Donnelly." Out of some 20 to 30 meetings a few receipted bills for chair rental had been lost, but the evidence of both employer and the DGWU officers was positive that the company had never paid rental for any chairs to be used at a union meeting and that the union had paid every bill they had received for such rental. Absolutely nobody testified that the company had ever paid chair rental for the union. Thus it soon developed that the Board had no case and that it was proceeding on the theory that if you cross-examine enough people, long enough, on enough different subjects you would finally elicit evidence that some out of many meetings years ago had begun before working hours were over, or at least that some persons would so testify, or that some company facilities had been used by officers of the union, or some similar fact, and that if three or four witnesses could be found whose memory disagreed with that of everyone else the Board would always accept the minority. Their only witness on the merits, Elsa Lou Greenhaw, was so completely discredited that after the examiner's first opinion, which relied on her as being able to outweigh all other witnesses (A 519), she was never mentioned again. This theory of procedure can only be valid if the law is that if some scintilla of evidence favorable to the complainant can be developed

it may be considered alone without any regard to the over-all picture and a result based upon it. But this is not the law. If Mrs. Reed did express an opinion that violence should not decide union affiliation *at a time when the plant was threatened with what the courts have determined was unlawful violence,* it would seem clear such comment was within the right of free speech, (see *Edward G. Budd Mfg. Co.* v. *NLRB,* 142 Fed. (2d) 922), and in any case should not bind the employees where it is clear that their action is the result of their own convictions.

**(b) The Board's witnesses.**

But in its second hearing the Board had full information as to what was required in order to make a case. It produced witnesses of its own—six of them. Although produced in rebuttal, in spite of the fact that the Board has the burden of proof, we should perhaps consider whether the Board is getting around to making an affirmative case. Let us consider the substance of the testimony of these witnesses for the Board.

Of these six witnesses, Mrs. Keyes was not an employee in the sense the word has been generally used in this litigation. She was office manager handling finances until the spring of 1938 (X p. 3640) and since then operating a clothing factory in Kansas City which produces sportswear and a defense garment (X 3661). She knew "nothing whatsoever of the union activities in the Donnelly Garment Company" (X 3660), and believes the testimony of Mr. Keyes that so far as he knows no official or person with authority ever advised or suggested to any employees that they should join the DGWU or stay out of the International, was true. (X 3660-1). She stated that since the year 1932 no one in the firm of Gossett, Ellis,

Dietrich & Tyler had been employed on legal work by the Donnelly Garment Company (X 3661).

As for the remaining five witnesses, to consider their testimony as evidence which a reasonable mind could accept in the light of all the evidence as establishing that the employees were dominated in their organization of the union is simply absurd. To begin with, all but one of them stated that they don't believe it themselves, although it is the ultimate fact they were put on the stand to prove. In reference to the affidavit that the DGWU was the free voluntary considered wish and choice of the employees who signed and that they did not want to belong to the International or any other union and earnestly urged a secret election to further demonstrate that fact, which affidavit was sworn to by some 1,100 signers (see Vol. VI, p. 1677 to 1749, inclusive). Etta Dorsey, whose signature appears on the second line on page 1689, testifies as follows (Vol. IX, 3383):

> "Q. Was the affidavit at the time you signed and swore to it true or false so far as you are concerned? A. True."

Lola Skeens testified as follows (IX 3462):

> "Q. I'll hand you intervener's Exhibit No. 20 and ask if that is your signature that appears on page 6060 of the Circuit Court record? A. Yes, that is my signature.
>
> . . . . . .
>
> "Mr. Ingraham: Now, it is stated in this affidavit, 'each signer hereby further states that he or she has read or had read to him or her the contents of this affidavit.' Do you recall reading the affidavit, Mrs. Skeens? A. Yes."

And at (3463):

"And were the facts stated therein true? A. Yes."

Geneva Copenhaver avoided answering the question as to whether she was threatened or dominated or believed the employees were not acting of their own free will for many pages but rather reluctantly committed herself as follows (3492 and on 3501):

> "Q. Well, do you consider there are parts of it that are true and parts of it that are false? A. No; but as I read that, the way I understand it, that we signed that as more or less of a petition to prove that (fol. 6209) we had joined the Donnelly Garment Workers' Union under our own free will.
>
> "Q. Well, that part of the affidavit, then, you consider true, is that right? A. To the extent that I wasn't threatened in any way, or forced by any means into signing a card or signing my name into the union—to join the Donnelly Garment Workers' Union.
>
> A. It was my free and voluntary act to the extent that I wasn't threatened in any way to sign that card—forced in any way. They didn't force me or threaten me, or anything, to make me join that union at any time."

She suggested that she did have the feeling that if she didn't sign she might not have a job but the only explanation for that impression she could give was the fact that she knew a closed shop was contemplated as a demand on the employer and that if it was obtained she realized that only union members would be employed (X 3529):

> "Q. Did you ever hear of a closed shop contract between the Donnelly Garment Workers' Union and the Donnelly Company? A. Yes, I have heard that mentioned.
>
> Q. And don't you know that a closed shop agreement is an agreement by which the employees who

are eligible for that union must belong to the union which has the closed shop agreement? A. I don't know that I ever had it explained to me.

Q. Did you hear it discussed in the meeting of May 11, 1937? A. Closed shop agreement?

Q. Yes. A. I don't remember.

Q. Didn't you hear it discussed by the members of the executive committee and by Rose Todd that they contemplated asking the Donnelly Garment Company for a closed shop contract? A. I don't remember.

Q. And wasn't it explained in that meeting, if they got a closed shop contract, everybody in the Company eligible (fol. 6270) for membership in the union would have to belong to the union? A. That's the way I got it."

Mrs. Weilert agreed that when the DGWU was formed she believed it was in response to the voluntary action of the employees (X 3581):

"Q. Now, Mrs. Weilert, you stated that when the union was formed you thought that it was an organization formed by the voluntary action of the employees? A. Yes."

It developed that her husband had written a letter at her dictation repeating the assertion that her action in union matters was voluntary and according to her own wishes (Vol. X, p. 3591 and 3600).

May Stevens flatly stated that she committed perjury when she swore that the DGWU was her own choice. See p. 3690:

"Q. I will ask you to note the last paragraph, which says:

'The undersigned state that they are members of the Donnelly Garment Workers' Union, and joined

said union and have at all times since remained members thereof solely of their own free will, choice and preference, and that they have not been influenced by any threats, coercion or pressure of their employer or any representative of said employer, and that they have no knowledge of any incidents in which the employer or any representative of the employer has exerted pressure, intimidation, coercion or (fol. 6632) any other influence upon the undersigned or any other employees to join the Donnelly Garment Workers' Union, or to stay out of any other labor union.'

Was that true or false at the time you made it? A. It was false.

Q. At the time you made it it was false, is that your answer? A. As to my state of mind about it."

And at p. 3703:

"By Mr. Hogsett:

Q. I think I understood your answer to Mr. Tyler, but I want to be very sure about it. Did you tell him that when you signed this affidavit on the 2nd of June, 1939, which he showed you and which appears on page 6090 of the record, that you knew that you were swearing to a false affidavit? A. I did."

. . . . . .

She gives no evidence or reason for her feeling that there was pressure, but her secret relations with the International hereinafter mentioned explain it completely. She was not permitted by the examiner to answer the question as to whether her husband was an organizer for a labor union (R. 3683; offer of proof 3685).

This is, of course, an astounding sort of evidence upon which to base a request that any fact-finding body find that hundreds of reputable, unimpeached witnesses are not telling the truth. The reason for its existence develops

quickly and unmistakably. Each and every one of these five witnesses at the time of or after their discharge or resignation had various resentments, quarrels or hatreds toward the Company or the DGWU and appreciated an opportunity to express their resentment. Their personal complaint about the nature of their work or their discharge, etc., is what they are on the stand to tell, and not one of them could be claimed to be unbiased. See Vol. IX, 3364, quoting from Mrs. Dorsey:

"A. I quit because I wasn't treated right.

. . . . . .

Q. You weren't treated right, you thought. A. I don't think, I know.

Q. You quit because you were mad? (fol. 5985) A. I wasn't treated right when I quit.

Q. Well, you are mad at the Company? A. I won't say at the Company. I was mad at some of those people down there, they didn't treat me right.

Q. Who are you mad at? A. Well, that Cecile Ealy is a snake in the grass.

. . . . . .

A. Well, I will admit I got a little mad at Mrs. Reed because she wouldn't hear me, and I thought after practically 16 years of service that she should have seen me and talked to me and hear my side of the story."

And at 3365:

"Q. What is Cecile Ealy's position there? A. I don't really know. She is a sort of tattle-tale down there.

Q. You were mad and venomous about this whole matter (fol. 5986), weren't you? Just boiling mad, aren't you? A. Yes, when her name comes up it makes me mad."

Lola Skeens at p. 3447:

"Q. Were you dissatisfied with your work? A. Not with my work exactly.

Q. What were you dissatisfied with? A. With Cecil.

Q. What had Cecil done? A. Well, she didn't like me very well, and I wasn't very happy working under her."

Bessie Weibert at p. 3563:

"And I said, 'Well, I'm just going to sit here, I'm not going to take any part in (fol. 6329) these meetings.' And she said, 'Well, Bessie, aren't you pleased with some of the things that are being done?'

. . . . . .

(Continuing) And I said, 'Yes, with what is being done, but there isn't nearly enough being done, Rose.' And I said, 'From now on don't expect me to do anything about it.' I said, 'I'm through.' And I did —I really sat in from then on."

And again at page 3564:

"I absolutely know that Rose Todd and Mary Copowycz framed two other operators and myself, because I caught her on it right after it was done."

May Stevens secretly joined the International the same day or the day following her joining the DGWU, and thereafter remained a member of the DGWU, but passed names of DGWU members on to Jane Palmer, an attorney for the International (see pp. 3696 and 3708):

"Q. Mrs. Stevens, you stated that when you got away from the Donnelly Garment Company on the evening of (fol. 6640) the 27th of April, 1937, after you had signed the Donnelly Garment Workers' Union card, you called the International Ladies' Gar-

ment Workers' office? A. As soon as I got home, I called.

Q. And did you get someone on the telephone then? A. Yes, I did, someone in the office.

Q. And do you know who it was? A. No, I couldn't say now who it was.

Q. Did you meet a Miss Jane Palmer? A. She is the one that came to my house that night.

Q. And did you tell her that you had just signed the Donnelly Garment Workers' Union card? A. Yes, sir.

Q. And that you wanted to join the ILGWU? A. Yes.

Q. You got this card the next day? A. Yes."

* * * * * * *

And at p. 3708:

"Q. To whom did you report ~~names~~ of members of the ILGWU that you got or thought you could get in the plant? A. Only the one person, Jane Palmer."

No comment is needed as to her bias.

These witnesses recall that the violence of the International at the Gordon and Gernes plants and the threat to extend it to the Donnelly plant was known to, and a frequent subject of conversation among, the employees of the Donnelly plant, and while they generally personally professed that they were never alarmed for themselves, yet they testify that the idea of organizing a union of their own would be a means of protection against a *forcible* attempt to organize them by the International, was a substantial cause throughout the plant generally of the organization of the DGWU. See the testimony of Geneva Copenhaver, p. 3514:

"Q. Now, is it not a fact that the violence at the Gernes, Gordon and Missouri plants caused the Donnelly employees to organize the Donnelly Garment Workers' Union? A. Well, I guess that is what brought it about."

Of Mrs. Weilert at 3581:

"Q. Now, Mrs. Weilert, you stated that when the union was formed you thought that it was an organization formed by the voluntary action of the employees? A. Yes.

Q. Did the violence at the other garment plants in 1937 cause you to feel that a plant union would protect the employees? A. Well, I didn't know if it was the union that would protect us, that was a mystery to me; I didn't know any (fol. 6361) thing about unions, but I did feel like we needed protection if they came down there."

And the testimony of Mrs. Skeens at 3455:

"Q. Were the employees generally frightened about what was going on at these other strikes? A. Why, I think some of them were, most of them were.

Q. Were you? A. Yes."

The bulk of the testimony of these witnesses is a recital of their own individual quarrels with the management or with the DGWU. and a testimony as to details of the hours of holding some out of many meetings about five years previously, and as to why they did or did not at the noon recess or other times remain overtime at a meeting of the executive committee without being docked on their pay sheet by the Company. Although these events were years ago, the witnesses had not considered them for years and their memories colored by bias and partisanship had only been refreshed within the past few days before testifying. See 3369 (Mrs. Dorsey):

"Q. Now, when were you first asked by anyone connected with either the Labor Board or Mr. Langsdale's client about the incidents you have testified to in this hearing? A. When I was first asked about—will you please ask me again?

Q. Yes, I will. A. Thank you.

Q. When were you first asked by anyone connected with the Labor Board or anyone connected with Mr. Langsdale or his client about the incidents you have testified to here in this hearing? A. Well, I can't remember the date.

Q. Well, roughly; I don't care to bind you to the exact date. Was it within the last week, or was it within the last 10 days, or the last month? Fix it as near as you can. A. Well, I'll say within the last 10 days."

And at 3466 (Lola Skeens):

"Q. That was the first person you ever told about that? A. Yes.

Q. And that was when, that you told Miss Weyand? A. About a week ago. I don't remember what day it was."

And at 3520 (Geneva Copenhaver):

"Q. When was the first time you ever talked with anybody about this affidavit that was shown you this morning, this intervener's Exhibit No. 20? A. When? You mean, just recently?

Q. When was any time, other than the time you signed it? A. Other than when I signed it?

Q. Yes. A. I don't know when the first time was.

Q. Well, you have talked with somebody about it before you took the witness stand, haven't you? A. Yes.

Q. Who was that? A. Miss Weyand.

Q. When did you talk with her about it? A. Last night.

Q. Any time prior to last night? A. I don't remember whether I did or not.

Q. When did you talk with Miss Weyand about your testimony in this case prior to last night? A. Let's see. I believe it was in July.

Q. Now, are those the only two times you have talked with Miss Weyand? A. No. I talked with her one other time, about a week ago."

* * * * * * * *

And at 3685 (May Stevens):

"Q. When did you first see those minutes? A. Possibly a couple of weeks ago.

Q. And that was the first time in your life you had ever seen those minutes? A. Yes.

Q. The minutes of the meeting described as about five years ago? A. Yes."

Note carefully that if the Board admits such a thing as primary evidence then these five witnesses are its case. Yet what they actually say is that they personally have grievances against the Company or co-employees which they would be glad to discuss, but that so far as the matter of whether the employees did voluntarily and of their own free will and on their motion organize their own labor union, the employees are telling the truth when they say they did. There is one who never reaches any clear answer to the question through many pages of testimony, and one who probably through some feeling of loyalty to some other organization and duty to carry the fight all the way professes false swearing on this point in the past. It is not necessary to quote authorities to establish that her testimony on the point is without weight. But if the Board's case is not consideration of the direct testimony of the many people who have primary knowledge, including their own witnesses, then it is a case

in which all of the primary evidence of petitioners is unimpeached and the effort to ignore or destroy it by relying on inferences from subsidiary facts is unavailing.

The value of secondary facts and inference from them must vary in every case because they must be considered in the light of contrary evidence and all the material evidence. We have found no case in which the affirmative evidence of the genuine free will persistent choice of a plant union even approaches the strength of such evidence in this case. But there are many cases in which the evidence of domination through insignificant favors of an employer or unauthorized remarks by an employee, or insignificant use of employer's property, or encroachments on time, have been held insufficient to establish invalidity of a union, and in all of these cases the contrary evidence in support of the validity of the union was far weaker than it is in the case at bar.

See:

*National Labor Relations Board* v. *Lion Shoe Co.*, 97 Fed. (2d) 448.

*Balston-Stillwater* v. *National Labor Relations Board*, 98 Fed. (2d) 758.

*Staley* v. *National Labor Relations Board*, 7 Labor Relations Reporter 302.

*Midland Steel Products* v. *National Labor Relations Board*, 113 Fed. (2d) 800.

*National Labor Relations Board* v. *Ford Motor Co.*, 114 Fed. (2d) 905.

*National Labor Relations Board* v. *Draper Corp.*, 145 Fed. (2d) 199 at 205.

*National Labor Relations Board* v. *International Shoe Co.*, 116 Fed. (2d) 31.

*Magnolia Petroleum Co.* v. *National Labor Relations Board*, 112 Fed. (2d) 549.

*National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292; 83 L. Ed. 660.

*Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 Fed. (2d) 985.

*National Labor Relations Board* v. *Sands Mfg. Co.*, 96 Fed. (2d) 721, 306 U. S. 332; 83 L. Ed. 682.

*National Labor Relations Board* v. *Asheville Hosiery Co.*, 108 Fed. (2d) 288.

*Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 Fed. (2d) 134.

*Bussman Mfg. Co.* v. *National Labor Relations Board*, 111 Fed. (2d) 783.

*Martel Mills Corp.* v. *National Labor Relations Board*, 114 Fed. (2d) 624.

*Consolidated Aircraft Case*, 46 National Labor Relations Board 1120.

*Magnolia Petroleum* v. *NLRB*, 112 Fed. (2d) 545 at 549:

"And, when it is clear as here, that the material evidence is entirely without dispute; that no witness denies a fact to which another testifies; that in short, the findings are based, not upon conflicting but upon nonconflicting evidence, our determination as to whether the Board's findings must stand or fall must not rest upon whether the Board deems that the inferences it drew are supported by substantial evidence. It must rest upon whether measured by the settled rules governing the review of jury verdicts, it is the opinion of this court that the undisputed facts are in law capable of fairly giving rise to the fact inference the Board has drawn.

"It nowhere provides, and there is no warrant in it for the view, that preference by employees for an unaffiliated, as against a nationally affiliated organization, raises a presumption that this preference was coerced or bought by the employer. Indeed, the statute goes on exactly the contrary presumption that em-

ployees have the intelligence and chara ter requisite for self-organization, either by joining an existing labor organization or forming one of their own."

*NLRB* v. *Thompson Products*, 97 Fed. (2d) 13 at page 15 (italics ours):

"'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration *all the facts* presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.

The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, *unless all of it is weighed in its totality*, errors will result and great injustices be wrought."

Treating evidence in the case as a whole, each item in the light of other established facts, as it must be treated, the most that the Board's evidence can hope to do is to establish that certain secondary disputed facts may be true and that, if true, certain inferences as to the primary facts to be determined may be drawn from them. But reaching the conclusions from such inferences is allowable only when positive, substantial, unimpeached, established evidence to the contrary does not appear or at least does not appear in substantial quantities. See *Pennsylvania Railroad* v. *Chamberlain*, 288 U. S. 341, 77 L. E. 823.

"And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions, of which the following are examples: (Citing cases.) A rebuttable inference of fact, as said by the court in Wabash R. Co. case 'must necessarily yield to credible evidence of the actual occurrence.' And as stated by the court in *George* v. *Mississippi P. R. Co.*, 213 Mo. App. 668, 251 S. W. 729, *supra*, 'It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences'."

We earnestly and sincerely believe and submit that in the case at bar the secondary and generally disputed incidents and the possible inferences therefrom, cannot be considered substantial evidence on the primary fact to be determined (*i. e.*, the choice of the employees as to labor representation and whether it was free or dominated), in the light of the universal sworn testimony of all the employees who, as witnesses, were unimpeached and who have consistently and repeatedly so testified or offered to testify to the same effect over a period of several years.

Whenever hundreds of people are thrown together during the working day for months and years and in many evening meetings, with a common and vital interest in a subject agitated among them personally and by the press, it is inevitable that there would be hundreds of statements, situations and actions, and that from such limitless num-

ber there could always be selected scores of them from which any desired inference about that subject could be drawn. This would be true of anything, from a Sunday school picnic to a meeting of the United States Congress, if the subject of discussion persisted for a comparative length of time. And this is all that the Board's evidence boils down to. We wind up the evidence where it started with the positive testimony of 1,200 unimpeached witnesses who know the fact, opposed by 5 discredited ex-employees, developed some years after the event. We doubt if we should say "opposed," for although these witnesses complain that they were not properly treated when they worked at the Donnelly plant and express varying degrees of dislike or hatred for the Company or the plant union and testify to being ordered to attend meetings or other incidents shown not to be typical, even if true, yet, if we can understand their evidence, they tacitly admit that the great majority of the employees formed their own union, largely as a means of protection against the threatened violence of International.

## IV.

**Intervener was denied due process of law and a fair trial and the Board's finding and order under such circumstances cannot stand.**

**(a) The bias and prejudice of the examiner.**

**(b) The refusal of the examiner and the Board to either receive or consider as material the important and specific evidence for the taking and consideration of which the case was specifically remanded by the Circuit Court of Appeals.**

**(a) The bias and prejudice of the examiner.**

One of the vital elements of a fair trial is a judge or board or examiner who is unprejudiced as to the particular issue he or it is to try. This is, of course, a different thing than his general philosophy of justice, or his knowledge of the law, or his mistakes as to the law, or even his desire to reach a result which he may believe is right. If his belief as to what the facts are, or what are the correct inferences from them in the case to be tried, has already been reached, or definitely inclined toward a certain conclusion, or his moral support engaged in a general way on one side or the other, then neither litigant is required to rely on a speculative possibility that the judge may make the correct allowance for his own prejudice and by this uncertain further difficult, if not impossible, process, nevertheless give a fair trial. If prejudice exists no judge, board or examiner can tell how much to allow for it or how to correctly discount it even though he might earnestly desire to do so. The litigant is entitled to a different judge. He is entitled to an open and receptive mind in which a decision is to be reached on the evidence presented, unaffected by preconceived or prejudiced ideas. This is just as true of an administrative body, with power to pass on the facts, as it is of a court.

Moreover, it applies when the surrounding circumstances, actions and remarks of the judge or board indicate prejudice without resorting to the impossible attempt to see into the mind of the court itself.

See *Morgan Sheep Com. Co.* v. *U. S.*, 82 L. Ed. 1129, l. c. 1134, 304 U. S. 1; 58 S. Ct. l. c. 999:

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

*Inland Steel* v. *NLRB*, 109 Fed. (2d) 9, l. c.

"That a trial by a biased judge is not in conformity with due process is sustained by the authorities.

"The recognition of the principle is as essential in proceedings before administrative agencies as it is before courts. As was said in *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, at page 304, 35 S. Ct. 724, at page 730, 81 L. Ed. 1093:

"* * * Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" (citing case) of a fair and open hearing be maintained in its integrity (citing case). The right to such a hearing is one of "the rudiments of fair play" (citing case) assured to every litigant by the Fourteenth Amendment as a minimal requirement (citing cases). There can be no compromise on the footing

> of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored.'"

In *Berger* v. *United States*, 255 U. S. 22, 65 L. Ed. 481 (l. c. 486), the Supreme Court of the United States said with reference to the section of the Judicial Code disqualifying a judge for bias or prejudice:

> "* * * but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial—free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment."

*Montgomery Ward* v. *NLRB*, 103 Fed. (2d) 147, at 156:

> "Obvious bias of examiner. Naturally, it requires reading of this entire evidence to get the full perception of the clearly biased attitude of the examiner. Instead of maintaining the impartial position of one who is to determine—in a preliminary stage—the ultimate facts and action thereon, he assumed the place of attorney supporting the complaint."

That the intervener did not receive such a fair or impartial trial is evident from the facts.

Before the taking of any testimony in the rehearing the company filed an application for the appointment of a different trial examiner. The intervener joined in this application (Vol. A, p. 499). The grounds were set forth in the affidavit supporting the application (Vol. A, p. 475-493). The Board denied the application (Vol. A, p. 498), and the company and the intervener filed objections (Vol. A, 502, A, 504).

It may be urged that the examiner repeated statements in the first hearing that the sworn testimony of any number of employees, though unimpeached and in no way discredited, was worthless (Vol. A, pp. 483, 484, 485, 492), was a mere mistake of law. But when after the Appellate Court's ruling that such testimony was material and must be admitted, weighed and considered, he again ignored it in his second (Vol. X, p. 3837), it can hardly be denied that prejudice existed.

**(b) The refusal of the examiner and the Board to either receive or consider as material the important and specific evidence for the taking and consideration of which the case was specifically remanded by the Circuit Court of Appeals.**

The International urges in its brief that rejection of evidence is only judicial error and not denial of due process. Probably the degree of importance of the material evidence wrongfully rejected has some bearing on the question of whether such action amounts to denial of due process. Even the International impliedly recognizes that the wrongful exclusion of evidence "essential to a party's case" would amount to denial of due process. Clearly, the rejection of all of the testimony of witnesses who must know the fact concerning which they propose to testify, as the Court of Appeals has pointed out, and where the trier of the fact accepts isolated bits of their testimony about details as to whether meetings were held on certain dates and times with the universal result of treating them as establishing the contrary of what they testify and where this is done in violation of the mandate of the supervisory court, it is more than a mere refusal to admit material evidence and amounts to making a mockery of the trial.

See *Gung You* v. *Nagle*, 34 Fed. (2d) 848 at 851:

"The refusal to hear competent witnesses or competent testimony available is a denial of due process of law, as we held in a recent case refusing to permit the taking of a deposition in such cases. *Young Bark Yau* v. *U. S.*, (CCA No. 5777, filed June 17, 1929) 33 Fed. (2d) 236. The mere hearing of witnesses by an officer is of no avail to a party if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses * * *"

See, also:

*Stone* v. *Stone*, 136 Fed. (2d) 761, 764.
*George* v. *Capital Traction Co.*, 295 Fed. 965, 968.
*Deposit Guaranty Bank and Trust Co.* v. *U. S.*, 48 Fed. Sup. 369, 371.
*New York & Cuba Mail SS Co.* v. *Continental Ins. Co.*, 32 F. Sup. 251, 265.
*American Alliance Ins. Co.* v. *Brady Transfer & S. Co.*, 101 Fed. (2d) 144, 149.
*Alabama Title and Trust Co.* v. *Millsap*, 71 Fed. (2d) 518, 520.
*Becher* v. *Miller*, 7 Fed. (2d) 293, 295.
*Winn* v. *Consolidated Coach Corp.*, 65 Fed. (2d) 256, 257.
*NLRB* v. *Columbian Enameling and Stamping Co.*, 306 U. S. 292, 299, 83 L. Ed. 660, 665, 59 S. Ct. 501.
*NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332, 339, 83 L. Ed. 682, 687.
*Appalachian Electric Power Co.* v. *NLRB*, 93 F. (2d) 985, 989.
*Magnolia Petroleum Co.* v. *NLRB*, 112 F. (2d) 545, 548.
*NLRB* v. *Bell Oil and Gas Co.*, 98 (F. (2d) 406, 410.
*NLRB* v. *A. S. Abell Co.*, 97 F. (2d) 951, 958.
*Gunning* v. *Cooley*, 281 U. S. 90, 94, 74 L. Ed. 720, 724.

The refusal to allow any witnesses for intervener to testify in its case in chief, and receive any substantial number of employees in the company's case, is discussed as affecting the question of whether there was substantial evidence elsewhere. It is also important on the point of whether there was due process. Of course, a case is not really tried at all if a certain amount of material, relevant and important evidence is excluded from admission and from the consideration of the facts from which the verdict springs.

When it comes to the specific evidence involved the question of the absolute necessity of its due consideration answers itself. The primary question before the Board was one of mental fact—of motive—of the state of mind of a certain group of people. The law does not say that because we cannot see into people's minds therefore there is no primary evidence and we will determine it exclusively by inference. The motive and intent of people is determined every day by the courts and their testimony as to such mental fact and their explanations of how they reached it is received as important evidence. The sworn testimony of the large group of people involved who know what the fact is and the reasons and explanations they give are important evidence on the fact to be determined. The first is subject to cross-examination and all of the accepted tests of truthfulness, including impeachment, and the second is subject to the tests as to whether such reasons are probable and persuasive or unlikely and absurd. But to refuse to give them any weight at all, and rely entirely on secondary, disputed, minor facts, from which inference only may be drawn, is to simply fail and refuse to try the issue.

See *Mart Mills Corporation* v. *NLRB*, 114 Fed. (2d) 624, at 631:

> "Obviously our chief guide is the words of the witness under oath who undertook to disclose the workings of his mind. If his explanation is a reasonable one, the onus is upon the Board to establish the falsity of this explanation and the truth of its own interpretation. See *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 Fed. (2d) at page 862."

*Magnolia Petroleum Co.* v. *NLRB*, 112 Fed. (2d), l. c. 548:

> "In its capacity as accuser, the Board, under the genius of our institutions, is held to the same burdens and obligations of proof as any other litigant who takes the affirmative. It may not by accusing put the accused upon proof. As accuser it must prove its charge.
>
> In its capacity as a trier of facts, the Board stands on the footing of a jury. Like a jury it must be impartial. Like a jury, it may not make findings without evidence to support them and as in the case of a jury, it is for the courts to say whether there is or is not evidence in support."

And again at 549:

> "When then, as here, the Board applies to this court for enforcement of its order, and there is a substantial challenge of the findings and order as unsupported by evidence, it is the duty of this court to examine the evidence for itself, not, of course, to determine what fact inferences it, acting as a trier, would have drawn, what fact findings it would have made, but to determine whether reasonable minds having no interest as accuser or otherwise in the result, but wholly impartial, could upon the evidence have legally and fairly drawn

the fact inferences, made the fact findings. And, when, it is clear as here, that the material evidence is entirely without dispute; that no witness denies a fact to which another testifies; that in short, the findings are based, not upon conflicting but upon nonconflicting evidence, our determination as to whether the Board's findings must stand or fall must not rest upon whether the Board deems that the inferences it drew are supported by substantial evidence. It must rest upon whether measured by the settled rules governing the review of jury verdicts, it is the opinion of this court that the undisputed facts are in law capable of fairly giving rise to the fact inferences the Board has drawn.

This must be so for if it were not, if the Board in the determination of these sometimes bitter and always partisan contests between nationally affiliated locals and those unaffiliated; were given the right at once, to sponsor as accuser the side of the national organization, and to determine conclusively, for itself, unchecked by judicial review not only the effect of conflicting evidence, but whether in law there is any substantial evidence to sustain its accusation it would be nothing short of a miracle if these proceedings either in their course or in their results should be found to afford due process. The American people from their beginnings have been skeptical of the occurrence of such miracles, and they have not been willing to leave the vital matter of a fair and just trial to the hazard of miraculous intervention. It is plain from the careful provisions the Congress has made in the act against the exercise of this unbridled power that it is equally skeptical of such miracles, and that it is equally unwilling to leave to such hazards the rights of self-organization which the statute guarantees to workers, free from compulsion from any source. *For, while a proceeding of this kind takes the form of a charge against the employer, the real substance and design of it is to seat one labor organization over another.*

*with the greatly unjust result, if the decision of the labor board is wrong, of depriving employees of the very rights the act guarantees them.*" (Italics ours.)

See also *NLRB* v. *Bell Oil & Gas Co.*, 98 Fed. (2d) 406, at 410.

That not only a necessary but the controlling issue in the case is whether the employees have been acting in accordance with their own choice or have been dominated or interfered with by the employer, is clearly stated by the Circuit Court of Appeals in previous appeal of this case. This does not mean that the latter class of facts are without value, since there are many situations in various labor cases in which they may, if existent, prove and meet the burden of proof on the Board of establishing the domination of a labor union. But they must do so not in a vacuum and with consideration limited solely to them, but within the framework of *all the evidence* which is material and competent, and if, in the face of the affirmative evidence of the free choice of the employees, such inferences from secondary facts lose all persuasive value, then it cannot be said that there is substantial evidence upon which a judgment in favor of the Board can be based. See *Donnelly Garment Company* v. *NLRB*, 123 Fed. (2d) 215, at 221:

> "The *main* and *controlling* issue in the case was whether the formation or administration of the Donnelly Garment Workers' Union had been supported, dominated or interfered with by the company, or whether that union was a bona fide independent labor organization formed and administered exclusively by the employees of the company and completely free from employer influence, domination and support." (Italics ours.)

The court on the first appeal would not have sent this case back for rehearing if it were not true that the testimony of the employees and the proper consideration of that testimony was necessary in order to reach a decision. If such testimony had been merely an unnecessary but interesting sidelight on the evidence or the attitude of the Board, the court might have commented upon that fact, but would have allowed the decision to stand. See page 224:

> "The truth is that a controversy tried before a court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered."

And by the "testimony of the employees" the court meant their testimony as to their own state of mind, as to whether they acted from their own choice or were dominated. See page 222:

> "The individuals who form an unincorporated association certainly should know what sort of an organization it is, how it happened to be formed, who influenced its formation, and who controls it. We think there can be no doubt of the right of the members of such an organization to testify to such matters, and that their evidence is admissible regardless of its weight."

It must follow that since on the retrial the Board could not secure any favorable evidence on this vital point upon which a reasonable mind could base a finding of domination, then it has failed to carry the burden of proof. If inferences claimed by the Board were enough to establish domination regardless of the testimony of the employees as to mental facts, no matter what it might have been,

then the finding of the Board would simply have been affirmed.

Incidentally, to hold that several hundred employees are either perjurers or so stupid that they do not know whether they did a thing because they desired to or because they are intimidated into doing it, is to unjustifiably attack their integrity or their intelligence or both.

The refusal of the examiner to admit evidence of any facts whatever occurring since the first hearing is a further denial of due process (Vol. VIII, p. 2597; Vol. XI, p. 4000). It is not maintained that it would be proper to try charges on matters not alleged in the complaint and occurring since it was filed, but a flat ruling that nothing occurring since the first hearing in 1939 is admissible is simply a violation of law and logic. A medical examination even during the trial throws light on whether a man was injured in the past. A photograph of streets taken recently, an examination of the books and many other facts after a first trial have evidentiary value. See 32 C. J. S., Sec. 581, p. 437, and Sec. 585, p. 439. As stated by opponent's counsel: "Because it has always been my theory that it has always been proper to prove something before by something which happened after" (Vol. X, p. 3577). The continuous and successful operation of the union down to the present time and for some seven years continuously is such a fact. A recent ruling of the Treasury Department which forbids the expenditure of funds on prosecution of a union which has operated successfully and without complaint for three months is recognition of the fact and policy that the continuous, peaceful operation of a union is persuasive evidence of its acceptability to employees.

In the case at bar the DGWU was formed April 27, 1937. An agreement in which terms were reached with the

company on May 27, 1937, and a supplemental agreement, including wage scales, was signed on June 22, 1937. The first charges by the International were not filed before August, 1938, and the NLRB filed a complaint on April 6, 1939, which was withdrawn and another filed on April 27, 1939. Thus two years elapsed before complaint was filed. This situation was entitled to consideration by the Board in reaching its conclusions, but the evidence was not considered.

The unvarying acceptance of any evidence no matter how inferential and how much discredited when offered by the International or the Board, and the unvarying discrediting of any evidence no matter how primary and free from impeachment which was offered by the company or the intervenor (see *NLRB* v. *Union Pacific Stages*, 99 Fed. (2d) 153, at 177, cited *supra*, and cases cited therein. Also *NLRB* v. *Thompson Products*, 97 Fed. (2d) 13) establishes bias, which makes due process impossible.

## Conclusion.

The Board has twice failed to make a case. It has done so the second time after express detailed and authoritative directions as to what is required in order to make a case in this situation. It has admitted in effect that it cannot make a case for if it could have done anything whatever with the testimony of any of the employees it would certainly have done so. It again admits that it cannot make a case when it flatly denies the statement of the Court of Appeals that the evidence of the employees as to their choice and how and why they were influenced is material and relevant, and reasserts that it is immaterial and irrelevant. Yet again it admits that it cannot make a case when it asks this Court to ignore the gaps in the evi-

dence which should have been placed on the scales as pointed out by the Court of Appeals. In such a situation the company and the intervener should not be put to the heavy expense of time and money for a third hearing. The Board's order should be vacated, its complaint ordered dismissed and decision rendered in favor of the intervener.

Respectfully submitted,

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## APPENDIX.

**Excerpts from the explanation of the purposes and intents of the Federal Administrative Procedure Act in the Senate.**

The Congressional Record, 79th Congress, 2nd Session, Vol. 92, p. 2199, Discussion of Administrative Procedure Act, Senate, March 12, 1946, reports the following discussion on the floor of the Senate relating to the provisions of Section 10 (e):

Mr. Ferguson: "Would the Senator, then, say that the judgment or decision of the agency must be based upon stronger proof than a scintilla of evidence?"

Mr. McCarran: "Very much stronger."

Mr. Ferguson: "The old rule which applied in the courts, particularly on certiorari, was that if there was any evidence to sustain the verdict or judgment, it should be sustained. The courts have many times so held. The Senator would say, would he not, that something more than 'any evidence' is required to sustain a decision?"

Mr. McCarran: "The answer is in the affirmative. We say that the evidence must be substantial probative evidence."

Mr. Ferguson: "So we are changing the rule which has been applied in the past that any evidence, or a scintilla of evidence, as it is sometimes defined, is sufficient to sustain a verdict or judgment?"

Mr. McCarran: "We tried as best we could to establish a guide for administrative groups so that they would apply the rule in such a way that there would be substantial probative evidence behind their findings, and so that they could say, 'We are not afraid to have our findings reviewed by a court.' • • •"

• • • • • • •

Mr. George: "The courts have many times held that if there is any evidence to sustain the findings of an administrative board under the statute, the courts have no power to intervene. If this bill should become a law would that rule, as heretofore construed by the courts, remain in effect?"

Mr. McCarran: "The courts have given various constructions. The courts, in reviewing an order, are governed by the provisions of Section 10 (e), which states the substantial-evidence rule. In other words, in some instances the courts have held that there must be substantial evidence. We are saying that there must be probative evidence of a substantial nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its finding."

Mr. George: "The point I wish to raise is that some of the Acts of Congress, particularly those enacted in recent years, have led the courts to hold—and they so hold—that if there be any evidence to sustain the finding of a board or agency, the court has no power to interfere with it."

Mr. McCarran: "I would put it in this way—"

Mr. George: "Would the enactment of this bill require some substantial or probative evidence to support such a finding?"

Mr. McCarran: "Yes."

Mr. George: "Take the labor relations cases. Senators are familiar with them. The circuit courts have frequently complained against what the Labor Relations Board did, but have said, 'We are powerless to interfere with it.' Would this bill change that rule, if the court were of the opinion that there was no probative evidence?"

Mr. McCarran: "Yes; it would change that rule."

Mr. George: "I am pleased to hear it."

Congressional Record, 79th Congress, 2nd Session, March 12, 1946, p. 2198:

Mr. Austin: "Did the committee intentionally choose the language 'except as supported by relevant, reliable, and probative evidence' in order to avoid the rule of scintilla of proof? This phrase is very significant, as I see it. On review, for example, the case, in order to carry through as decided by the agency, would have to be supported by relevant, reliable, and probative evidence. That is, in my opinion, a very important forward step in judicial procedure, to say nothing about administrative procedure. For my part I am glad to see it in the bill."

Mr. McCarran: "Let me say to the Senator from Vermont that in the preparation of this bill many obstacles were encountered. Some of us insisted that the testimony must be relevant, material, and competent, and that nothing else should be taken. However, representatives of agencies came before us and presented their views, saying that such a rule would curtail their operations, and that they ought to be given greater latitude. They said to us, 'We are not lawyers. We are acting in a quasi-judicial capacity. We ought to be able to go outside and get hearsay testimony, if you please, we might be able to indulge in theory.' So rather than curtail the agencies, we sought an intermediate ground which we thought would be protective of the rights of individuals, and at the same time would not handicap the agencies. So we said to them, 'You may go outside and get what would be secondary evidence, or hearsay; you may perhaps even go into the realm of conjecture; but when you write your decision it must be based upon probative evidence and nothing else. If in the formation of your decision you consider other than probative evidence, your decision will be subject to being set aside by a court of review.'

"In other words, we did not wish to destroy the administrative agencies or proscribe the methods under which they have been operating. Some of us

know that in committees of the Senate we very frequently hear evidence which we know is hearsay. I doubt very much if any hearing is ever conducted in which, to some extent, hearsay is not admitted. But we believe, and we now believe, that reasonable men can sift the grain from the chaff. Then we laid down the rule that the administrative agencies must not make a finding which impinges upon an individual unless there is behind such finding probative evidence to sustain it. That is what we have worked out in this bill."

Congressional Record, Senate, p. 2200:

"As a matter of language, 'substantial evidence' would seem to be an adequate expression of law. The difficulty, if any, arises from the practice of agencies to rely upon—and, in some cases, the tendency of courts to tacitly approve—something less than adequate evidence; to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine, in the final analysis, and in the exercise of their independent judgment, whether on the whole the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts; and the proper performance of its public duties will require the agency to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill, as worded, fail to produce the desired result, supplemental legislation will be required."

Congressional Record, Senate, p. 2201:

Mr. McCarran: "Therefore, it will be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection * * *"

**Additional Applicable Part of National Labor Relations Act (Act of July 5, 1935; c. 372; 49 Stat. 449, 29 USCA, page 240).**

Part of Subsection (f): "Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under Subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

Subsection (h): "When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by Sections 101-115 of this title."